

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

May 03, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing in support of the application of Devin O'Connell for judicial clerkships. I teach international and constitutional law at George Washington Law School, and Mr. O'Connell was a student in my class on U.S. Foreign Relations Law.

I gave Mr. O'Connell an A- in that class, which covered both legislative and judicial aspects of U.S. foreign relations. He took an active and excellent part in class discussions. His knowledge of the legal and policy issues under discussion was outstanding; he showed impressive analytical skills, as well as an appreciation of the practical implications of the legal points at issue. He is very articulate and personable.

Mr. O'Connell's resume shows a background and interest in legal issues of all kinds. He has been Notes Editor of the Energy and Environmental Law Journal, has been a litigation law clerk in the DC Office of Human Rights, and has taken a wide variety of courses in various fields of the law.

I have no doubt that Mr. O'Connell would do an excellent job as a judicial clerk, and strongly recommend him for such positions.

Sincerely,

Professor Michael J. Matheson

Michael Matheson - mmatheson@law.gwu.edu

The George Washington University Law School
2000 H Street NW
Washington, DC 20011

May 03, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to support Devin O'Connell's application for a judicial clerkship in your office. Devin is a 2021 graduate of the George Washington University Law School, where I am a faculty member. Devin has taken two of my classes, one as a first-year student (Property) and one in his second year (Environmental Law). He performed well, especially in Environmental Law. Based on Devin's performance in the two classes he took with me, my conversations with him outside of class, and the Note he wrote for the environmental specialty law journal at GW Law, I am confident that he would be a fine law clerk.

Devin's performance in my Property class was solid. He significantly improved his performance in my Environmental Law class, in which he received an A-. I consider Environmental Law to be a better test of a student's analytical skills and a better predictor of success after graduation than most first-year courses. In teaching the course, I emphasize a mix of doctrine, development of statutory interpretation skills, capacity to craft well-reasoned arguments on behalf of a client's position, and the relevance of policy considerations to the adoption and revision of legal rules. A strong performance on the final examination in that course therefore indicates that a student has mastered several important sets of skills that are needed to be a successful lawyer. Devin's class participation and final exam provide me with confidence that he has done exactly that.

I had frequent occasion to talk with Devin, as he visited my office to discuss issues that we addressed in class or progress on his law review note. The impression I got from these conversations is that Devin is conscientious, intellectually curious, and committed to making the most of his law school education. He decided to write his note on the application of the 14th Amendment's Privileges and Immunities Clause to provide remedies for harms related to climate change. His thesis was creative and novel and his analysis was interesting and persuasive. I know from conversations with Devin that he prides himself on his writing and analytical skills, and his work on the climate change note is consistent with that evaluation. His fellow students must agree because they chose him as the Notes Editor this year for the GW Journal of Energy and Environmental Law.

Devin envisions a career in a small firm or as an attorney for the federal government. His interests include criminal defense work and environmental tort litigation. His experience as a litigation law clerk for the District of Columbia Office of Human Rights during the summer after his first year of law school exposed him to litigation practice that would be useful in either of those two areas. Devin had arranged a summer internship with a federal agency for this summer, but the Covid-19 pandemic caused the government to cancel that opportunity.

My bottom line is that I think Devin will be an excellent law clerk and a credit to the legal profession throughout his career. He is an engaging person with a good sense of humor, so I have no doubt that he will be enjoyable to work with. I hope you choose to interview him. Please let me know if you have any questions about Devin.

Very truly yours,

Robert L. Glicksman
J.B. & Maurice C. Shapiro Professor
of Environmental Law

Robert Glicksman - rglicksman@law.gwu.edu - 202-994-4164

DEVIN O'CONNELL

300 Massachusetts Ave. NW #318 | Washington, D.C. 20001 | 520-834-3003 | dpoconnell@law.gwu.edu

WRITING SAMPLE

I wrote the attached writing sample in the second semester of my first-year legal writing and researching class at The George Washington University Law School. The parties and facts are fictional. I briefed for Appellant, Arnold Anderson, who appealed his conviction for attempted robbery under the first paragraph of 18 U.S.C. § 2113(a) to the United States Court of Appeals for the Third Circuit. The issues in the case were whether the first paragraph of Section 2113(a) requires an element of force, violence, or intimidation in an attempt to commit bank robbery, and whether there was sufficient evidence to convict Anderson for attempted bank robbery. Currently, there is a circuit split on the issue of whether force, violence, or intimidation are essential elements in the first paragraph of Section 2113(a), and the Third Circuit has not addressed this issue.

However, shortly before oral arguments, the Third Circuit decided *United States v. Garner*, 915 F.3d 167 (3d Cir. 2019). In *Garner*, the Third Circuit sustained Garner's conviction for attempted bank robbery even though the jury convicted Garner through the substantial step test (the Model Penal Code's substantial step test does not require the Government to prove force, violence and intimidation to convict a defendant for attempted bank robbery). I revised my brief to consider the effect of *Garner*, and argued that because the Third Circuit did not address the statutory construction issue, did not address the circuit split, and provided little rationale for its use of the substantial step test, *Garner* did not require affirmance of Anderson's conviction.

No. 19-2507

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

ARNOLD (“ARNIE”) ANDERSON

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

*Appeal from the United States District Court
For the District of New Jersey*

BRIEF FOR APPELLANT

3379
2000 H Street, NW
Washington, DC 20052
(202) 000-0000
Attorney for Appellant

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ARGUMENT

I. THIS COURT SHOULD REVERSE DEFENDANT ANDERSON'S CONVICTION BECAUSE THE DISTRICT COURT WRONGLY INSTRUCTED THE JURY.

The District Court erred by instructing the jury that conviction for attempted bank robbery under the first paragraph of 18 U.S.C. § 2113(a) could be made through the substantial step test because the substantial step test does not contain an element of force, violence, or intimidation.¹ The plain meaning of the first paragraph of Section 2113(a) demonstrates that the Government must prove that the defendant used force, violence or intimidation in the attempted bank robbery. This interpretation of 18 U.S.C. § 2113(a) is supported by legislative history because Congress specifically amended Section 2113(a) with a second paragraph to allow defendants to be convicted of attempted bank robbery without proving force, violence, or intimidation. Accordingly, this Court risks ignoring congressional intent by affirming Anderson's conviction because affirmance would moot the distinction between the first two paragraphs of Section 2113(a).

Although this Court used the substantial step test in *United States v. Garner*, 915 F.3d 167, 168 (3d Cir. 2019), *Garner* is not dispositive of the issues in this case. The appellant in *Garner* did not raise the statutory construction issue in this case on appeal, this Court did not address the statutory issue, and did not examine the circuit split. Accordingly, *Garner* inadequately addressed the issues in this case, and does not compel affirmance of Anderson's conviction.

¹ Model Penal Code § 5.01.

Lastly, the evidence is insufficient to convict Anderson even if this Court adopts the substantial step test for attempted bank robbery because Anderson's conduct in Valley Bank fails to constitute intimidation under Section 2113(a) (the Government did not charge Anderson with using force and violence). This Court is urged to adopt the plain meaning of the statute, abide by clear congressional intent regarding the distinction between paragraphs one and two, and reverse Anderson's conviction.

A. Intimidation Is an Element of Attempted Bank Robbery Based on the Plain Meaning of the First Paragraph of Section 2113(a).

The District court erred by instructing the jury that Anderson could be convicted of attempted bank robbery through the substantial step test because intimidation is an element of attempted bank robbery according to the plain meaning of the first paragraph of 18 U.S.C. § 2113(a).

The first paragraph of Section 2113(a) requires for conviction that the defendant “by force and violence, or by intimidation, takes, or attempts to take . . . any thing of value belonging to . . . any bank.” 18 U.S.C. § 2113 (2018). The Fifth and Seventh Circuits examined the statutory language and found intimidation to be an element of attempted bank robbery. *United States v. Thornton*, 539 F.3d 741, 746-47 (7th Cir. 2008) (concluding that the elements of force, violence and intimidation modify the attempted takings element because force, violence and intimidation precede the attempted takings element); *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004). The Fifth and Seventh Circuits also concluded that allowing conviction under the first paragraph of Section 2113(a) without requiring the jury to find that the defendant used force, violence, or intimidation would run against congressional intent. *Thornton*, 539 F.3d at 746-47 (finding that Congress intended the second paragraph, not the first, in Section 2113(a) to cover

attempted bank robberies where the defendant did not use force, violence or intimidation);

Bellew, 369 F.3d at 451-52.

The Second, Fourth, Sixth, and Ninth Circuits ignored the language of Section 2113(a)'s first paragraph to formulate attempted bank robbery based on the substantial step test in order to fit their policy goals. *See United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976) (concluding that the substantial step test should be the proper formulation of attempt within Section 2113(a) because it allows law enforcement to arrest defendants before the endangerment of innocent bystanders); *United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990); *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984); *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir. 1977). The substantial step test does not require the Government to prove force, violence or intimidation in order to convict the defendant of attempted bank robbery. Model Penal Code § 5.01. The Second, Fourth, Sixth, and Ninth Circuits erred by putting policy before the meaning of the statutory text; the plain meaning ought to control.

Statutory interpretation begins with the language of the statute itself. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992); *Monzon v. De La Roca*, 910 F.3d 92, 101 (3d Cir. 2018) (“ ‘we begin with the understanding that Congress says in a statute what it means and means in a statute what it says there.’ ”). Where the meaning of a statutory provision is unambiguous, or “plain,” that meaning controls because deviation from the statute’s plain meaning supplants Congress’s role to determine statutory meaning. *See United States v. Goldberg*, 168 U.S. 95, 103 (1897) (“The courts have no function of legislation, and simply seek to ascertain the will of the legislator.”); *Oneale v. Thornton*, 10 U.S. 53, 68 (1810) (finding that if the legislature intended a different meaning than the plain meaning, “the words employed

would have been essentially different”); *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010) (“When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete.”). To determine ambiguity, the statute is read consistent with ordinary grammar conventions. *Elliot Coal Min. Co. v. Dir., Office of Workers' Comp. Programs*, 17 F.3d 616, 629 (3d Cir. 1994) (“Under the normal rules of English punctuation for words in a series, it is the absence of a comma or other punctuation before the coordinate conjunction “or” that would indicate it and its modifier . . . are to be treated separately rather than as part of the whole series.”). In ordinary grammar, a prepositional phrase placed before a group of nouns or verbs modifies them. *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 287 (2010) (stating that the prepositional phrase “in . . . administrative” modified “report, hearing, audit, or investigation” because “in administrative” came right before “report, hearing, audit or investigation” in the sentence); *United States v. Thornton*, 539 F.3d 741, 746-47 (7th Cir. 2008).

In the instant case, the District Court offered the following jury instruction which closely followed Section 2113(a)’s first paragraph: “to sustain the charge of attempted robbery . . . the Government must prove . . . the defendant acted to attempt to take such money by force and violence or by intimidation.” R. at 17. Although the language appears to contain an element of force, violence or intimidation, the jury convicted Anderson under the substantial step test, which did not require the Government to prove Anderson used intimidation (force and violence were not alleged). R. at 18.

Here, the District Court erred because intimidation is an element of attempted bank robbery. The first paragraph of Section 2113(a) defines bank robbery as “by force and violence, or by intimidation, [the defendant] takes, or attempts to take . . . any thing of value belonging to .

. . . any bank.” 18 U.S.C. § 2113 (2018). The key part, “by force and violence, or by intimidation [the defendant] takes, or attempts to take” must be read according to ordinary grammar conventions, *Elliot Coal Min. Co.*, 17 F.3d at 629, such that the prepositional phrase, “by force and violence, or by intimidation,” modifies the group of verbs that follow, “takes, or attempts to take.” 18 U.S.C. § 2113 (2018); see *Graham Cty. Soil & Water Conservation Dist.*, 559 U.S. at 287; *Thornton*, 539 F.3d at 746-47. Accordingly, there is an unambiguous and plain meaning: a defendant who uses intimidation, and attempts to take money from a bank commits bank robbery under the first paragraph of Section 2113(a).

The District court erred by instructing the jury that conviction for attempted robbery under the first paragraph of Section 2113(a) could be made through the substantial step test because intimidation is an element of attempted bank robbery.

B. Intimidation is an Element of Attempted Bank Robbery under the First Paragraph of 18 U.S.C. § 2113(a) because Congress Amended Section 2113(a) with a Second Paragraph to Allow Conviction of Attempted Bank Robbery Without Proving Intimidation.

This Court should reverse Anderson’s conviction of attempted bank robbery because Congress intended the second paragraph of Section 2113(a), and not the first, to criminalize attempted bank robberies where the defendant did not use force, violence, or intimidation.

Congress amended Section 2113(a) with the second paragraph to address what the Attorney General of the United States stated was a “incongruous result,” where the defendant could walk into the bank, steal money without using force, violence, or intimidation, and escape conviction. *Prince v. United States*, 352 U.S. 322, 325-26 (1957) (“It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision [paragraph two] was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before

completing the crime.”). When Congress amends a statute to address a gap in its enforcement, the Court should avoid mootng it. *Goldberg*, 168 U.S. at 103 (“The courts have no function of legislation, and simply seek to ascertain the will of the legislator.”). This Court should not construe statutory language to fit a policy aim not envisioned by Congress because it trespasses upon Congress’s role to determine matters of policy. *See Prince*, 352 U.S. at 325-26; *Goldberg*, 168 U.S. at 103.

Here, intimidation is an element of attempted bank robbery. Congress’s intent is clear from the legislative history; it added the second paragraph to address the “incongruous result” where the defendant attempted to rob a bank without using “force, violence or intimidation,” and could not be prosecuted under the first paragraph. *See Prince*, 352 U.S. at 325-26. Should this Court sustain Anderson’s conviction, this Court moots the purpose of the second paragraph because bank robberies attempted without the use of force, violence, or intimidation can be brought under the first paragraph. *See id.*

Moreover, the goal of criminal law to deter crime is not achieved by allowing the Government to charge more defendants under the first paragraph. Deterrence is the product of the degree of the criminal penalty, with higher penalties corresponding with greater deterrence. *United States v. Gunter*, 462 F.3d 237, 245 (3d Cir. 2006) (stating that Congress placed a greater penalty on possession of crack cocaine as compared to powdered cocaine in order to deter crack cocaine use more). Here, the penalty is the same for attempted bank robbery under the first and second paragraphs of Section 2113(a), 18 U.S.C. § 2113 (2018), and therefore the deterrent is the same. *Gunter*, 462 F.3d at 245.

This Court should reverse Anderson's conviction because Congress intended the second paragraph of Section 2113(a) to criminalize attempted bank robberies where the defendant did not use force, violence, or intimidation.

II. THE GOVERNMENT FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR ATTEMPTED BANK ROBBERY.

(Omitted)

CONCLUSION

(Omitted)

DEVIN O'CONNELL

1813 T St. NW, Apt. A | Washington, D.C. 20009 | 520-834-3003 | dpoconnell@law.gwu.edu |

I wrote this memorandum in my second semester as a law clerk in the Office of Enforcement Compliance Assurance (OECA), Water Enforcement Division at USEPA. In accordance with agency policy, I have modified or changed the facts to eliminated confidential or protected information. I refer to the defendant as “XYZ”. This memorandum addressed whether: (1) administrative regulations may take retroactive effect, and (2) whether the Clean Water Rule of 2015 and Navigable Waters Protection Rule of 2020 retroactively apply to the defendant’s conduct.

To: Laura Welles, Attorney Advisor
From: Devin P. O'Connell, Law Clerk
Re: Case XYZ and Applicability of the 1993 Clean Water Regulation
Date: Sept. 24, 2020

I. STATEMENT OF THE ISSUES

1. Whether administrative regulations may take retroactive effect, and under what circumstances, if any, regulations take retroactive effect?
2. Whether the Clean Water Rule of 2015 and the Navigable Waters Protection Rule of 2020 apply retroactively?

II. SHORT ANSWER

1. Yes. Administrative regulations may take retroactive effect provided: (1) Congress explicitly authorized the agency to promulgate retroactive regulations, and (2) if the regulation expressly indicates it takes retroactive effect. However, courts interpret retroactive language so narrowly that it is unlikely an agency could ever satisfy the explicit language requirements in the authorizing statute, or in the regulation.
2. No. The Clean Water Act does not authorize retroactive rulemaking, and neither the Clean Water Rule of 2015 nor the Navigable Waters Protection Rule of 2020 have express language authorizing retroactivity.

III. FACTUAL BACKGROUND

Defendant XYZ discharged petroleum-based asphalt (“asphalt”) from its facility in Washington, D.C. (“Facility”) into a nearby channel (hereinafter referred to as “Jefferson Ditch,” or “ditch”).¹ The Jefferson Ditch makes a bend and runs along Jefferson Avenue in Washington D.C., and connects the Facility to the Hamilton Waterway. The Hamilton Waterway, which currently supports navigation and is subject to the ebb and flow of the tide, runs into Anacostia River.² The Jefferson Ditch flows directly to the Hamilton Waterway on at least a seasonal basis, including during the drier summer months.³ The Jefferson Ditch is a tributary of the Hamilton Waterway and the downstream portions of the Jefferson Ditch are subject to the ebb and flow of the tide.⁴

On or about January, 2015, XYZ personnel were engaged in pumping asphalt from three rail cars.⁵ During the process of pumping asphalt between the rail cars and a storage tank, a connection in the piping between the tank and another storage tank failed, causing

¹ XYZ Compl. 9.

² *Id.* at 10.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 11.

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asphalt to overflow.⁶ Tens of thousands of gallons of asphalt discharged into the Jefferson Ditch through an open valve.⁷

IV. LEGAL BACKGROUND

A. Retroactivity in Administrative Rulemaking

The applicable regulations governing the defendant's conduct are the regulations in effect at the time of the alleged violation because regulations promulgated after the time of the violation would be retroactive if applied.⁸ There is a presumption against statutory retroactivity because it would be unfair to require regulated entities to comply with duties and obligations without notice.⁹ For the same reasons, the Administrative Procedure Act ("APA") creates a presumption against retroactivity in administrative rulemaking.¹⁰

Retroactivity is defined as a newly promulgated rule affecting the legal consequence of a past action.¹¹ Retroactive regulations are invalid, unless made consistent with an express grant of retroactive rulemaking authority in the authorizing statute.¹² Essentially, rules that render "past

⁶ *Id.*

⁷ XYZ Compl. 11.

⁸ *Hargress v. Soc. Sec. Admin., Comm'r*, 883 F.3d 1302, 1308 (11th Cir. 2018) (quoting *Sierra Club v. Tennessee Valley Auth.*, 430 F.3d 1337, 1351 (11th Cir. 2005)) ("[T]here is no point in specifying an effective date if a provision is to be applied retroactively."); *Celtronix Telemetry, Inc. v. F.C.C.*, 272 F.3d 585, 588 (D.C. Cir. 2001) (defining retroactive effect as whether the new rule would "impair the rights a party possessed when [they] acted, increase a party's liability for past conduct or impose new duties with respect to transactions already completed."); *See Bowen, infra*, note 18; *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1386, 1377 n.1 (Fed. Cir. 2002) (dismissing veterans proposed sanctions against the Department of Veterans Affairs for failure to pay injury benefits because the requested sanctions required the agency to set the regulation's effective date a month earlier than the statute specified); *See United States v. HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1059 n.12 (C.D. Cal. 2018) ("In any event, the spills here occurred between 2005 and 2010, meaning 'the 2015 EPA Clean Water Rule was not in effect when [the] discharges occurred and [the 2015 Clean Water Rule] therefore does not govern this case.' Thus, the court agrees with the government's assertion that 'the regulation in place at the time of Defendant's spills controls.'").

⁹ *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-9 (1988); *Nat'l Petrochemical & Refiners Ass'n v. F.C.C.*, 630 F.3d 145, 159 (D.C. Cir. 2010); *Celtronix Telemetry, Inc.*, *supra* note 11.

¹⁰ *See* 5 U.S.C. § 551 (commanding that a "rule" must be of "future effect").

¹¹ *Nat'l Petrochemical & Refiners Ass'n*, 630 F.3d at 159; *Celtronix Telemetry, Inc.*, *supra*, note 11.

¹² *Bowen*, 488 U.S. at 207-8, 209, 213-14 ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). Under the Medicare program, the Government reimburses health care providers, such as Georgetown University Hospital, for expenses incurred while administering medical care to Medicare beneficiaries. In 1984, the Department of Health and Human Services ("HHS") issued a rule, which changed the cost reimbursement schedules providers were required to comply with, and set the effective date for the new schedule as July 1, 1981. Under the new schedule, Respondents lost approximately two million dollars and challenged the regulations on the grounds that, *inter alia*, the agency lacked the statutory authority to create retroactive rules. The Supreme Court ultimately agreed and held that HHS exceeded its statutory authority under the Medicare Act because the provision authorizing the creation of Medicare reimbursement schedules permitted retroactive rules only on a "case-by-case" basis in adjudications, even though

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actions illegal or otherwise sanctionable” are invalid without a clear statement from Congress in the statute.¹³

The authority to promulgate retroactive rules may be found within the statutory provisions authorizing the agency to promulgate the specific regulations at issue, or may be found in the sections conferring general rulemaking authority to the agency.¹⁴ Grants of apparent retroactive authority are construed narrowly to comply with the presumption against retroactivity and ensure fairness.¹⁵ After determining that the agency’s authorizing statute allows retroactive rules, the agency must then include explicit language allowing retroactivity.¹⁶ Lastly, rules with effective dates on, or after the date of adoption, do not take retroactive effect because “there is no point in specifying an effective date if a provision is to be applied retroactively.”¹⁷

B. The Definition of Navigable Waters under the Navigable Waters Protection Rule of 2020.

The Navigable Waters Protection Rule, finalized on April 21, 2020, effective on June 22, 2020, and codified at 33 C.F.R. § 328.3, (“2020 Rule”) repealed the Clean Water Rule of 2015 (“2015 Rule”)¹⁸, and directed EPA to interpret “navigable waters” consistent with Justice Scalia’s

the regulation provided for “retroactive corrective adjustments.” Secondly, the Court held that the agency also generally lacked authority to create retroactive rules under the Medicare Act’s provisions conferring general rulemaking authority.

¹³ Nat’l Cable & Telecommunications Ass’n v. F.C.C., 567 F.3d 659, 670 (D.C. Cir. 2009).

¹⁴ See *Bowen*, 488 U.S. at 209-10. (examining the provision of the Medicare Act governing fee schedules for a clear grant of retroactive rulemaking authority before turning to the provision conferring general rulemaking authority to check for retroactive rulemaking authority).

¹⁵ *Id.* The Supreme Court disagreed with HHS’ claim that the Medicare Act’s grant of the authority to make “retroactive corrective adjustments” permitted HHS to retroactively adjust reimbursement schedules for all providers. The Court instead held that because the Medicare Act allows “retroactive corrective adjustments” for “a provider,” where the reimbursement amount is “inadequate or excessive,” the adjustments in reimbursement schedules applied only on a case by case basis, and only in adjudications. Apparently, because Congress chose the singular “provider” rather than a plural “providers” it used in other provisions, Congress intended retroactive rulemaking to affect only individual providers, rather than an entire category of providers as might be affected under a legislative rulemaking. In choosing the narrow construction, the Court ignored the possible construction that “inadequate or excessive” reimbursement for entire provider categories could still qualify as “suitable retroactive corrective adjustments,” and would be far more efficient than forcing regulated entities to justify their fee schedules in an adjudication.

¹⁶ *Id.* at 264 (“Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”).

¹⁷ *Hargress*, *supra* note 11; See also *Contreras-Zambrano v. Soc. Sec. Admin.*, Comm’r, 724 F.App’x 700, 704 (11th Cir. 2018).

¹⁸ The 2015 Rule defined waters of the United States to mean waters “jurisdictional by rule,” or any waters not categorically jurisdictional, but which are jurisdictional on a case by case basis according to their geographic properties. See 80 Fed. Reg. 37054-01, 37058 (June 13, 2015). The 2020 Rule, *inter alia*, narrowed the scope of the 2015 Rule by retaining only “jurisdictional by rule” waters, shifting the geographic analysis to whether the water fits into one of the 2020 Rule’s categories, and eliminating the category that waters may qualify on a case by case basis. See 85 Fed. Reg. 22250-01, 22257 (April 21, 2020).

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opinion in *Rapanos v. United States*.¹⁹ The 2020 Rule outlines the following categories of navigable waters, defined in the CWA as, “waters of the United States”:

(1) The territorial seas and waters which are currently used or were used in the past, or may be susceptible to use in interstate or foreign commerce including waters which are subject to the ebb and flow of the tide; (2) tributaries; (3) lakes, ponds, and impoundments of jurisdictional waters; and (4) adjacent wetlands.²⁰

Category (1), traditional navigable waters, includes “all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”²¹ Waters susceptible for use in interstate commerce include waters which are navigable in fact, or could be made so, for trade and travel.²²

Category (2), “tributary,” is defined as “a river, stream or similar naturally occurring surface water channel that contributes surface flow to the territorial seas, or traditional navigable waters. . . in a typical year either directly or through one or more tributaries . . . lakes, ponds, and impoundments of jurisdictional waters . . . or adjacent wetlands . . .”²³ The flow of water must be “perennial or intermittent in a typical year,” with “intermittent” meaning water flowing “continuously during certain times of the year and more than in direct response to precipitation.”²⁴ A tributary may also be a “ditch that either relocates [the] tributary, is constructed in [the] tributary or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of the tributary definition.”²⁵

Category (3) will not be discussed because the Jefferson Ditch is not a pond or similar body.

Category (4) adjacent wetlands are “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in

¹⁹ 33 C.F.R. § 328.3; 85 Fed. Reg. 22250-01, 22259 (April 21, 2020). On Feb. 28, 2017, President Trump issued EO 13778 which directed the agency to consider revision of “navigable waters” consistent with the late Justice Scalia’s opinion in *Rapanos*. Although, the regulation in force is contained at 33 C.F.R. § 328.3, the final rule at 85 Fed. Reg. 22250-01 contains explanatory material which helps put the complicated language of the regulation into perspective. The final rule is referenced herein for the purpose of understanding the agency’s construction of the language in Section 328.3.

²⁰ 33 C.F.R. § 328.3; 85 Fed. Reg. 22250-01, 22273 (April 21, 2020).

²¹ *Id.* at 22273.

²² See *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012) (noting that navigation is focused on commerce because federal jurisdiction is based on the Commerce Clause); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (holding that the term “navigable” means navigable in-fact waters or waters which could reasonably be made so); 85 Fed. Reg. 22250-01, 22286 (April 21, 2020).

²³ 85 Fed. Reg. 22250-01, 22286 (April 21, 2020).

²⁴ *Id.* at 22286, 22275.

²⁵ *Id.* at 22286.

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saturated soil conditions.”²⁶ Not all wetlands are subject to CWA regulation; only “adjacent wetlands” are “waters of the United States.”²⁷ Under 33 C.F.R. § 328.3(c)(1)(i), adjacent wetlands are wetlands that “abut, meaning touch at least at one point or side of a [traditional navigable water, tributary, or lakes and ponds, and impoundments of jurisdictional waters].”²⁸ Lastly, a ditch constructed into a wetland may also be a “water of the United States,” if it is “constructed in an adjacent wetland . . . [has] perennial or intermittent [flow] and contributes surface water flow to a traditional navigable water.”²⁹

V. DISCUSSION

In this case, XYZ contends that the 2015 Rule applies to the discharge of asphalt into the Jefferson Ditch.³⁰ XYZ claims that application of the 2015 Rule precludes liability under the CWA, 33 U.S.C. § 1321(b)(3), because under the 2015 Rule, it did not discharge asphalt into navigable waters.³¹ However, even if EPA wanted the 2015 Rule to apply retroactively, EPA lacks the requisite authority under the CWA to create retroactive rules. Therefore, the 2015 Rule cannot take retroactive effect and cannot apply to XYZ’s conduct. Moreover, the 2015 Rule fails to be retroactive because it includes a prospective effective date, and regulations with prospective effective dates are clearly not retroactive.³²

XYZ alternatively contends that application of the 2020 Rule precludes liability, but for the same reasons that the 2015 Rule does not apply, the 2020 Rule does not apply. Accordingly, the 1993 regulations apply to XYZ’s asphalt discharges into navigable waters in violation of Section 1321(b)(3) of the CWA because the 1993 regulations were the remaining regulations in effect at the time of the violations.

The 2015 Rule and the 2020 Rule Do Not Apply to Defendant XYZ’s Asphalt Discharges.

The 2015 Rule and 2020 Rule do not apply because the CWA does not confer retroactive rulemaking authority to EPA. Moreover, even if the CWA conferred retroactive rulemaking authority, neither the 2015 Rule, nor the 2020 Rule clearly state they take retroactive effect. In fact, they take prospective effect.

²⁶ 33 C.F.R. § 328.3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See 33 C.F.R. § 328.3.; 85 Fed. Reg. 22250-01, 22251 (April 21, 2020).

³⁰ O’Connell Letter to XYZ, 1, June 1, 2020; XYZ Briefing Doc.

³¹ See O’Connell Letter to XYZ, 1-2, June 1, 2020.

³² 80 Fed. Reg. 37054-01, 37054 (June 29, 2015) (setting effective date of Aug. 28, 2015).

To: Laura Welles, Attorney Advisor
 From: Devin P. O'Connell, Law Clerk
 Re: Case XYZ and Applicability of the 1993 Clean Water Regulation
 Date: Sept. 24, 2020

1. CWA Does Not Confer Statutory Authority to Issue Retroactive Regulations.

EPA promulgated the 2015 Rule pursuant to its authority under the CWA.³³ The relevant provisions are 33 U.S.C. §§ 1321, 1342, 1361, which prevent the discharges of oil and other hazardous substances into navigable waters, make the discharge of pollutants without a permit unlawful, and generally authorize EPA to promulgate regulations enforcing the CWA, respectively.³⁴ Section 1321(b)(2)(A) outlines the procedures for the promulgation of rules pertaining to the discharge of “hazardous substances, other than oil,” while Section 1321(b)(2)(4) allows “the President . . . by regulation [to] determine . . . those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare.”³⁵ As the Supreme Court noted in *Bowen v. Georgetown Univ. Hosp.*, specific language requiring retroactivity must be present within the statutory provision.³⁶ Finally, if such authorizing language allowing retroactivity exists, the Court construes the provision narrowly.³⁷

In this case, Section 1321(b)(2) never mentions retroactivity, either by using the word “retroactive” in any form, or by delegating authority to promulgate rules with effect on past legal duties and obligations.³⁸ For the exact same reasons, Sections 1342 and 1361 fail to confer EPA the authority to create retroactive rules.³⁹ Accordingly, the CWA does not authorize EPA to promulgate regulations with retroactive effect.

2. The 2015 Rule Is Not Retroactive.

In the unlikely event a court finds a grant of retroactive rulemaking authority in the CWA, XYZ may argue that the 2015 Rule applies to its discharges of asphalt in 2015. However, the 2015 Rule is not retroactive because it includes a prospective effective date.⁴⁰ Furthermore, the rule does not contain any other explicit language indicating that the agency intended the regulation to take retroactive effect.⁴¹

³³ See 80 Fed. Reg. 37054-01, 37054 (June 29, 2015).

³⁴ 33 U.S.C. §§ 1321, 1342, 1361. XYZ is alleged to have violated Section 1361 and the attending regulations.

³⁵ 33 U.S.C. § 1321.

³⁶ See *Bowen*, 488 U.S. at 264.

³⁷ *Id.*

³⁸ See 33 U.S.C. § 1321; *Bowen*, 488 U.S. at 209 (finding that the Medicare Act did not permit retroactive rules outside of a case-by-case basis in adjudications because although the relevant section allowed for the “making of suitable retroactive corrective adjustments,” the absence of clear language conferring a general retroactive rulemaking authority, as opposed to retroactive “corrective adjustment” in an adjudication, precluded a finding that HHS possessed the relevant authority under the statute).

³⁹ 33 U.S.C. § 1342, 1361; *Bowen*, 488 U.S. at 209.

⁴⁰ 80 Fed. Reg. 37054-01, 37054 (June 29, 2015) (setting effective date of Aug. 28, 2015).

⁴¹ See *Bowen*, *supra* note 41.

To: Laura Welles, Attorney Advisor
From: Devin P. O'Connell, Law Clerk
Re: Case XYZ and Applicability of the 1993 Clean Water Regulation
Date: Sept. 24, 2020

3. *The 2020 Rule Is Not Retroactive.*

In the event XYZ fails to successfully assert the applicability of the 2015 Rule, it might very well argue that the 2020 Rule applies to its discharges in 2015. However, for the reasons stated above, the 2020 Rule does not apply here either. Specifically, the CWA does not confer retroactive rulemaking authority to the EPA, the 2020 Rule has a prospective “June 22, 2020,” effective date, and the regulation possesses no language conferring retroactive authority.⁴² Accordingly, the 2020 Rule is not retroactive.

VI. CONCLUSION

The 2015 Rule and the 2020 Rule do not apply to XYZ’s asphalt discharges because the CWA does not confer retroactive rulemaking authority, and the rules are not retroactive. Accordingly, the 1993 regulations in effect at the time of the violations apply to XYZ’s discharges.

⁴² *Hargress, supra*, note 11; 85 Fed. Reg. 22250-01, 22250.

Applicant Details

First Name	Tess
Middle Initial	M
Last Name	O'Leary
Citizenship Status	U. S. Citizen
Email Address	tmoleary@syrr.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>368 Coleridge Ave.</div> <div>City</div> <div>Syracuse</div> <div>State/Territory</div> <div>New York</div> <div>Zip</div> <div>13204-2517</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	3153451356

Applicant Education

BA/BS From	Hobart and William Smith Colleges
Date of BA/BS	May 2014
JD/LLB From	Syracuse University College of Law
	http://www.law.syr.edu
Date of JD/LLB	May 6, 2022
Class Rank	20%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Keith, Bybee
kjbybee@syr.edu
Gouldin, Lauryn
lgouldin@syr.edu
315-443-9547

References

Maria Surdokas, 202-702-6865, maria.surdokas@faa.gov
Laurie Hobart, 315-443-9541, lnobart@syr.edu
Sanjay Chhablani, 315-443-2531, schhablani@syr.edu
Robert Murrett, 315-443-3682, rbmurrett@syr.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

368 Coleridge Ave.
Syracuse, NY 13204
(315) 345-1356

June 18, 2021

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R.
Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Magistrate Judge Hanes:

I am a rising third-year student at Syracuse University College of Law and wish to apply for a clerkship in your chambers for the 2022-2024 term.

A resume, law transcript, law school grading policy, undergraduate transcript, and writing sample are enclosed. Letters of recommendation from Syracuse College of Law Professors Bybee and Gouldin will be submitted separately.

Please do not hesitate to contact me at the above address or telephone number if you should need additional information regarding my application. Thank you for your time and consideration.

Sincerely,



Tess O'Leary

Enclosures

TESS O'LEARY

368 Coleridge Ave. ▪ Syracuse, NY 13204 ▪ (315) 345-1356 ▪ tmoleary@syr.edu

EDUCATION

Syracuse University College of Law, Syracuse, NY

Candidate for Juris Doctor, May 2022

Candidate for Certificate of Advanced Study, May 2022

National Security and Counterterrorism Law

GPA: 3.61 (35/202; top 17%)

Activities: Asian Pacific American Law Student Association, Secretary; National Security Student Association; Hancock Estabrook Oral Advocacy Competition

Maxwell School of Citizenship and Public Affairs, Syracuse, NY

Candidate for Master of Arts in International Relations, May 2022

GPA: 3.87

William Smith College, Geneva, NY

Bachelor of Arts, Public Policy, May 2014

Minor: Psychology, Latin American Studies

Activities: Study Abroad: Mendoza, Argentina (Fall Semester 2012); Carmarthen, Wales (Spring Semester 2012)

EXPERIENCE

U. S. Attorney's Office, N. D. N. Y., Syracuse, NY

August 2021 – May 2022

Intern

U. S. Department of Justice, Washington DC

May 2021 – Present

Intern, National Security Division, Counterterrorism Section

- Assist trial attorneys with the drafting of Classified Information Procedures Act motions and other pleadings
- Conduct legal research and analysis on money laundering, unlawful firearms possession, and due process implications relating to international terrorism cases

Syracuse University, Syracuse, NY

August 2020 – Present

Teaching Assistant for Vice Dean Keith Bybee

- Instruct a class of twenty undergraduate students in "Law in the Liberal Arts"
- Plan and facilitate a weekly discussion session to strengthen students' writing skills

Research Assistant for Professor Cora True-Frost

October 2020 – February 2021

- Researched and drafted memos on consular relations, abortion rights, and disability rights

Federal Aviation Administration, Washington DC May 2020 – August 2020
Legal Honors Intern, Office of Chief Counsel, Employment and Labor Law Division

- Drafted response to complainant's appeal in support of Agency's procedural dismissal
- Reviewed Report of Investigation, drafted undisputed facts section, and drafted analysis of Agency's Motion in support of Summary Judgment
- Briefed Senior Executive on case analysis in response to complainant's settlement demands
- Researched employment and labor law issues and drafted memoranda summarizing research findings

Burton Blatt Institute, Syracuse, NY September 2019 – January 2020
Research Assistant

- Reviewed and edited summaries on issues including violations of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act

Bousquet Holstein PLLC, Syracuse, NY October 2017 – July 2019
Administrative Assistant and Immigration Case Coordinator

- Prepared and filed employment-based, family-based and other immigration petitions with U. S. Citizenship and Immigration Services

Peace Corps, San Cristobal, Dominican Republic August 2016 – September 2017
Youth, Families, Community Development Promoter

- Implemented sexual health awareness program for 50 high school students

VOLUNTEERING EXPERIENCE

Syrian Accountability Project, Syracuse, NY October 2019 – May 2021
Investigations and Special Project Team member

- Contributed to white paper on Yazidi genocide and Iraq's obligations under international law
- Researched crimes against humanity and war crimes that occurred during Syrian conflict
- Created a crime matrix and a detailed conflict narrative analyzing each crime that was committed, including the perpetrators and the geopolitical climate

Cold Case Justice Initiative, Syracuse, NY October 2019 – December 2019
Investigator

- Researched racially motivated crimes and wrongful deaths that occurred in NY from November 1957 to November 1959

Vera House, Inc., Syracuse, NY Spring 2018 and 2019
White Ribbon Campaign Co-Coordinator

- Managed fundraising and volunteering efforts for 90 Bousquet Holstein employees



LANGUAGES

Advanced proficiency in written and spoken Spanish

SYRACUSE UNIVERSITY

Office of the Registrar

Academic Transcript

O'Leary, Tess M		38860-8749	Transcript Print Date: 06/18/2021
Law		Law Record	
Major: Law			
Natl Secrty & Cntrterrorism Law			
Major: Natl Secrty & Cntrterrorism Law			
Fall 2019-Law			
Civil Procedure	LAW601	4.0	B+
Contracts	LAW603	5.0	A
Legal Skills & Analysis	LAW605	0.0	NR
Torts	LAW608	5.0	A-
Legal Communication & Research	LAW609	2.0	A-
Attempted: 16.0 Earned: 16.0 GrPts: 59.0010 GPA: 3.688			
Class Rank 26 out of 212 Dean's List			
Spring 2020-Law			
Constitutional Law	LAW602	3.0	A-
Criminal Law	LAW604	3.0	A
Property	LAW607	5.0	A-
Leg. Communications & Research II	LAW609	2.0	P*
Prof. Resp: Becoming a Lawyer	LAW647	3.0	B
Attempted: 16.0 Earned: 16.0 GrPts: 50.3360 GPA: 3.595			
Class Rank 40 out of 205			
Summer 2020-Law			
Washington Lawyer Seminar	LAW901	1.0	HH
DCEX	LAW902	5.0	P
Attempted: 6.0 Earned: 6.0 GrPts: 0.0000 GPA: 0.000			
Fall 2020-Law			
Constitutional Law II	LAW699	3.0	A-
National Security Law	LAW700	3.0	HH
International Law	LAW728	3.0	A-
Attempted: 9.0 Earned: 9.0 GrPts: 22.0020 GPA: 3.667			
Class Rank 31 out of 192			
Spring 2021-Law			
Leg. Communications & Research III	LAW690	2.0	B-
Administrative Law	LAW702	3.0	B+
Const Crim Pro Inv	LAW708	3.0	A
Post Conflict Reconstruction	LAW813	3.0	
Attempted: 11.0 Earned: 8.0 GrPts: 27.3330 GPA: 3.417			
Class Rank 35 out of 202			
Summer 2021-Law			
Natl Secrty & Cntrterrorism Law			
Evidence	LAW718	4.0	
Attempted: 4.0 Earned: 0.0 GrPts: 0.0000 GPA: 0.000			
** Law Record Credit Summary **			
Total Units Earned:	55.000	GPA Credits:	44.0
Transfer Credit:	0.000	Grade Points:	158.6720
Other Credit:	0.000	Cumulative GPA:	3.606
End of Law Record			
The Official transcript paper version is printed on security paper. The Official e-Transcript is delivered as a secured PDF document that certifies the authenticity. The University Registrar's signature and Syracuse University seal appear on the right. The Official transcript may not be released without the written consent of the student.		 	
		University Registrar	

SYRACUSE UNIVERSITY, Transcript Office, 109 Steele Hall, Syracuse, New York 13244-1120 (315) 443-2422

OFFICIAL TRANSCRIPTS: Transcripts are prepared by the Registrar's Office in accordance with policies of the American Association of Collegiate Registrars and Admissions Officers. Transcripts show only those credits earned at Syracuse University and those credits transferred from other institutions that are applied to the Syracuse degree program. Official transcripts are imprinted with the seal of the University and the signature of the University Registrar. A raised seal is not required. Without the seal and signature, this document is not an official transcript.

GRADE REPORTS: Grade reports show only courses and grades for a specific semester. Grade reports may also be used as supplements to transcripts which were previously requested by the student. Official grade reports also are imprinted with the seal of the University and the signature of the University Registrar.

3rd PARTY RELEASE OF A TRANSCRIPT OR GRADE REPORT: This transcript or grade report has been forwarded to you with the understanding that it will not be released to other parties. The federal Family Educational Rights and Privacy Act of 1974 prohibits release of this information without the student's written consent. Please return the transcript to Syracuse University if you are unable to comply with this condition.

DEGREES AND HONORS: Degree completion is signified on the transcript by an award date printed next to the degree name. **UNDERGRADUATE PROGRAM HONORS**, designated by the notation "HON" printed after the major, indicates that the student was part of the Honors Program and received honors in that field. **UNDERGRADUATE DEPARTMENTAL DISTINCTION**, designated by the notation "DPT" printed after the major, indicates that the student received distinction in that field. **UNDERGRADUATE UNIVERSITY HONORS** are awarded upon degree certification to students earning a superior cumulative GPA: Cum Laude, GPA 3.2 to 3.49 (Architecture), 3.4 to 3.59 (all other); Magna Cum Laude, GPA 3.5 to 3.79 (Architecture), 3.6 to 3.79 (all other); Summa Cum Laude GPA 3.8 to 4.0 (all schools). These designations appear next to the degree award date.

COURSE NUMBERING SYSTEM: Effective September 1968: **001-099:** When the semester heading reads "Semester Abroad", these are credit-bearing courses taken through the Syracuse University Abroad program. Under all other semester headings, these are remedial and non-credit courses; **100-199:** freshman level; **200-299:** sophomore level; **300-499:** junior and senior level; **500-599:** joint undergraduate and graduate; **600-699:** first-year graduate level; **700-899:** second and third-year graduate level; **900-996:** readings, research, and individual study courses at the doctoral level only; **997:** master's thesis; **998:** individual study at the graduate level; **999:** doctoral dissertation. Prior to September 1968, the course numbering system was **000-099:** lower division undergraduate; **100-199:** upper division undergraduate; **200-299:** joint undergraduate and graduate; **300-399:** graduate.

CREDIT: A unit of credit is represented by the semester hour, which stands for one class period of fifty (50) minutes in length for fifteen (15) weeks or the equivalent.

GRADE POINT AVERAGE: The grade point average (GPA) is calculated by dividing the number of grade points earned by the number of credits attempted.

GRADE	GRADE POINTS PER CREDIT	OTHER GRADING SYMBOLS	MEANING	GRADE POINTS PER CREDIT
A	4.0	AU	Audit	Not counted
A-	3.6666	H	Honors (Law only)	Not counted
B+	3.3333	HH	High Honors (Law only)	Not counted
B	3.0	I	Incomplete	0
B-	2.6666	NA	Did not attend	Not counted
C+	2.3333	NR	Not required	Not counted
C	2.0	P, P*	Passing	Not counted
C-	1.6666	RM	Remedial	Not counted
D (Undergraduate & Law only)	1.0	V	Variable length course – grade not yet due	Not counted
D- (Law only)	.6666	WD	Withdrew	Not counted
F	0			

Prior to January 1981, **NA**'s counted as **F**'s. Prior to August 2017 **NA** indicated Did not attend/withdraw. Obsolete symbols that may appear on older transcripts include **NC** (no credit, not counted for GPA); **S** (satisfactory, not counted); **U** (unsatisfactory, 0 points); **WF** (withdrew failing, 0 points); and **WP** (withdrew passing, not counted). As of September 1987, the grading system was expanded to include plus (+) and minus (-) grades as shown above for all non-Law courses. For Spring 2020, due to changes necessitated by response to the COVID-19 pandemic, Passing grades were assigned as **P***.

SPECIAL CODES	DESCRIPTION
(ar)	Course credit is not included in Units Earned or GPA Credits and grade points are not included in GPA calculation, in accordance with Academic Renewal policy.
(g)	This is a graduate level course taken by an undergraduate who has not been admitted to a graduate program at SU. It is not used to fulfill undergraduate degree requirements. The course credits count towards units earned, GPA credits, and the grade points are included in the GPA calculation.
(gn)	This is a graduate level course taken by an undergraduate admitted to a graduate program at SU. It is not used to fulfill undergraduate degree requirements and the credits may be transferred into the graduate record. On the undergraduate record, course credit is not included in Units Earned or GPA credits and grade points are not included in GPA calculations.
(n)	Course credit is not included in Units Earned or GPA Credits and grade points are not included in GPA calculations.
(r)	This is a retaken course and the credits and grade points are included in all calculations.
(un)	This is an undergraduate course taken by a graduate student. It does not count towards a graduate degree.
(HNR)	This is an Honors section of the course.
(X)	The F grade on this class is the result of a violation of the Academic Integrity Policy.

ENGINEERING AND COMPUTER SCIENCE COOPERATIVE EDUCATION PROGRAM consists of work experience in several segments, represented on the transcript as ECS 370/470/570, Professional Practice. A minimum of two work segments satisfy program requirements.

COLLEGE OF LAW: Prior to September 1999, Law courses could be given plus (+) grades. A grade of 'B+' earned 3.5 grade points per credit and a 'C+' earned 2.5 grade points per credit. As of September 1999 Law courses follow the plus/minus (+/-) grade system shown above. As of fall 2011, Law grading system expanded to include D-. College of Law students are ranked each semester and the class rank is displayed below the semester statistics. College of Law also places students with an appropriately high semester GPA on the Dean's List. This designation is displayed below the statistics for the semester.

COLLEGE OF LAW HONORS: Summa Cum Laude, GPA 3.55 and above; Magna Cum Laude, GPA 3.35 to 3.54; Cum Laude, GPA 3.00 to 3.34. The requisite minimum honors grade point average may have been increased in any year to assure that not more than 2% of any graduating class graduated summa cum laude, not more than 10% of any graduating class graduated either summa cum laude or magna cum laude, and not more than 25% of any graduating class graduated with honors. In calculating graduation honors, grade point averages at the College of Law are rounded to the nearest hundredth.

REGTRNLEG 05012020



HOBART AND WILLIAM SMITH COLLEGES

OFFICE OF THE REGISTRAR
Geneva, New York 14456

Page 1 of 3

ACADEMIC RECORD

Official Undergraduate Degree

Registrar

Name: Tess O'Leary
Student ID: 10181100

Fall 2008

Student Address: 368 Coleridge Ave
Syracuse, NY 13204-2517

Print Date: 06/14/2021

Academic Program History

Program: William Smith College

04/30/2010: Active in Program

04/30/2010: Undeclared Major

Program: William Smith College

11/15/2011: Active in Program

11/15/2011: Public Policy Studies (BA)
(Interdisciplinary) Major

Program: William Smith College

12/13/2011: Active in Program

12/13/2011: Public Policy Studies (BA)
(Interdisciplinary) Major
12/13/2011: Psychological Science (minor)
(Disciplinary) Minor

Program: William Smith College

09/03/2013: Active in Program

09/03/2013: Public Policy Studies (BA)
(Interdisciplinary) Major
09/03/2013: Psychological Science (minor)
(Disciplinary) Minor
09/03/2013: Latin American Studies (minor)
(Interdisciplinary) Minor

Program: William Smith College

05/19/2014: Completed Program

05/19/2014: Public Policy Studies (BA)
(Interdisciplinary) Major
05/19/2014: Psychological Science (minor)
(Disciplinary) Minor
05/19/2014: Latin American Studies (minor)
(Interdisciplinary) Minor

Degrees Awarded

Degree: Bachelor of Arts

Confer Date: 05/18/2014

Plan: Public Policy Studies (BA) (Interdisciplinary)

Plan: Psychological Science (minor) (Disciplinary)

Plan: Latin American Studies (minor) (Interdisciplinary)

Transfer Credits

Transfer Credit from Syracuse University
Applied Toward William Smith College Program

Course	Description	Accepted	1.00
GEO 155	The Natural Environment	Accepted	1.00
NEU 211	Introduction to Neuroscience	Accepted	1.00

Transfer Credit from Le Moyne
Applied Toward William Smith College Program
Fall 2009

Course	Description	Accepted	1.00
NSS 121	Global Resources	Accepted	1.00
PSY 101	Introductory to Psychology	Accepted	1.00

Beginning of Undergraduate Degree Record

Fall 2010

Course	Description	Attempted	Earned	Grade	Points
BIOL 167	Intro Topics:	1.00	1.00	A	4.00
Course Topic:	Dangerous Diseases				
BIOL 167	Intro Topics:	0.00	0.00		0.00
Course Topic:	Dangerous Diseases				
FSEM 093	Ethical Debates in Medicine	1.00	1.00	A-	3.70
LTAM 210	Latin American Perspectives	1.00	1.00	A	4.00
SPAN 102	Beg Spanish II	1.00	1.00	A-	3.70
SPAN 102	Beg Spanish II	0.00	0.00		0.00

GPA

	Attempted	Earned	Units	Points
Term GPA	3.85	Term Totals	4.00	4.00
Cumulative GPA	3.85	Cumulative Totals	4.00	4.00
		Transfer Totals	2.00	0.00
		Combined Totals	6.00	4.00

Term Honor: Dean's List

Spring 2011

Course	Description	Attempted	Earned	Grade	Points
BIOL 220	Genetics	1.00	1.00	B	3.00
BIOL 220	Genetics	0.00	0.00		0.00
SOC 100	Intro. Sociology	1.00	1.00	C+	2.30
SPAN 121	Intermediate Spanish I	1.00	1.00	A	4.00
SPAN 121	Intermediate Spanish I	0.00	0.00		0.00
WRRH 100	Writer's Seminar	1.00	1.00	A	4.00

FEDERAL LAW PROHIBITS ACCESS TO THIS RECORD BY ANY PARTY WITHOUT WRITTEN CONSENT OF THE STUDENT.

NOT VALID AS AN OFFICIAL TRANSCRIPT WITHOUT THE AUTHORIZED SIGNATURE OF THE REGISTRAR



HOBART AND WILLIAM SMITH COLLEGES

OFFICE OF THE REGISTRAR
Geneva, New York 14456

Page 2 of 3

ACADEMIC RECORD

Official Undergraduate Degree

Name: Tess O'Leary
Student ID: 10181100

Registrar

		GPA			
		Attempted	Earned	Units	Points
Term GPA	3.33 Term Totals	4.00	4.00	4.00	13.30
Cumulative GPA	3.59 Cumulative Totals	8.00	8.00	8.00	28.70
	Transfer Totals	4.00	4.00	0.00	0.00
	Combined Totals	12.00	12.00	8.00	28.70

Term Honor: Helen Heath Scholar

		Fall 2011			
Course	Description	Attempted	Earned	Grade	Points
CHEM 110	Intro. General Chemistry	1.00	1.00	B	3.00
CHEM 110	Intro. General Chemistry	0.00	0.00		0.00
ECON 160	Principles of Economics	1.00	1.00	A	4.00
PSY 210	Statistics & Design	1.00	1.00	A	4.00
PSY 210	Statistics & Design	0.00	0.00		0.00
SPAN 122	Intermediate Spanish II	1.00	1.00	A-	3.70
SPAN 122	Intermediate Spanish II	0.00	0.00		0.00

		GPA			
		Attempted	Earned	Units	Points
Term GPA	3.68 Term Totals	4.00	4.00	4.00	14.70
Cumulative GPA	3.62 Cumulative Totals	12.00	12.00	12.00	43.40
	Transfer Totals	4.00	4.00	0.00	0.00
	Combined Totals	16.00	16.00	12.00	43.40

Term Honor: Dean's List

		Spring 2012			
Course	Description	Attempted	Earned	Grade	Points
WALE 403	WALE Study IV 1.00	1.34	1.34	A-	4.96
WALE 404	WALE Study V 1.00	1.34	1.34	B	4.02
WALE 405	WALE Study VI 1.00	1.34	1.34	B+	4.42

WALE 403 "The Challenging World of Education"

WALE 404 "International Students Work Placement Internship Module"

WALE 405 "Cognitive Psychology: Learning, Reasoning & Language"

(Wales Abroad Program)

		GPA			
		Attempted	Earned	Units	Points
Term GPA	3.33 Term Totals	4.02	4.02	4.02	13.40
Cumulative GPA	3.55 Cumulative Totals	16.02	16.02	16.02	56.80
	Transfer Totals	4.00	4.00	0.00	0.00
	Combined Totals	20.02	20.02	16.02	56.80

Fall 2012

Course	Description	Attempted	Earned	Grade	Points
MEND 409	History & Culture of Argentina	1.00	1.00	A	4.00
MEND 410	Spanish Language	1.00	1.00	A	4.00
PSY 221	Intro to Psychopathology	1.00	1.00	B	3.00
REL 470	Sem: Nationalism	1.00	1.00	C-	1.70

		GPA			
		Attempted	Earned	Units	Points
Term GPA	3.18 Term Totals	4.00	4.00	4.00	12.70
Cumulative GPA	3.47 Cumulative Totals	20.02	20.02	20.02	69.50
	Transfer Totals	4.00	4.00	0.00	0.00
	Combined Totals	24.02	24.02	20.02	69.50

Spring 2013

Course	Description	Attempted	Earned	Grade	Points
EDUC 220	Storytelling	1.00	1.00	A	4.00
EDUC 307	Civil Rights Education	1.00	1.00	A-	3.70
EDUC 333	Literacy	1.00	1.00	A	4.00
Req Designation:	Service Learning Course				
PHIL 151	Cont. Issues: Crime & Punishment	1.00	1.00	B	3.00
SPAN 225	Hispanic Media: Contemp. Issue	1.00	1.00	A-	3.70

		GPA			
		Attempted	Earned	Units	Points
Term GPA	3.68 Term Totals	5.00	5.00	5.00	18.40
Cumulative GPA	3.51 Cumulative Totals	25.02	25.02	25.02	87.90
	Transfer Totals	4.00	4.00	0.00	0.00
	Combined Totals	29.02	29.02	25.02	87.90

Term Honor: Dean's List

FEDERAL LAW PROHIBITS ACCESS TO THIS RECORD BY ANY PARTY WITHOUT WRITTEN CONSENT OF THE STUDENT.

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HOBART AND WILLIAM SMITH COLLEGES

OFFICE OF THE REGISTRAR
Geneva, New York 14456

Page 3 of 3

ACADEMIC RECORD

Official Undergraduate Degree

Name: Tess O'Leary
Student ID: 10181100

Registrar

Fall 2013

Course	Description	Attempted	Earned	Grade	Points
EDUC 306	Technology And Disability	1.00	1.00	C+	2.30
Req Designation:	Service Learning Course				
EDUC 336	Spec Topics:	1.00	1.00	B-	2.70
Course Topic:	Teaching English Abroad				
EDUC 370	Multiculturalism	1.00	1.00	C+	2.30
GOAL 003	Quantitative Reasoning	0.00	0.00	CR	0.00
GOAL 004	Scientific Inquiry	0.00	0.00	CR	0.00
GOAL 005	Artistic Expression	0.00	0.00	CR	0.00
GOAL 006	Gender, Race, Class	0.00	0.00	CR	0.00
GOAL 007	Multiplicity/World Cultures	0.00	0.00	CR	0.00
GOAL 008	Ethical Judgement & Action	0.00	0.00	CR	0.00
PPOL 497	Public Policy Brief	0.00	0.00	CR	0.00
PSY 203	Intro. Child Psychology	1.00	1.00	C+	2.30
RCOL 101	Readers College I (fall)	0.50	0.00	NC	0.00
Course Topic:	Unwired Pt. I				
SPAN 231	The Art of Translation	1.00	1.00	B+	3.30

Undergraduate Degree Career Totals:

Undergraduate Degree Career Totals:		GPA				
		Attempted	Earned	Units	Points	
Cumulative Totals		35.02	33.02	33.02	110.80	
Transfer Totals		4.00	4.00	0.00	0.00	
Cumulative GPA	3.36	Combined Totals	39.02	37.02	33.02	110.80

End of Official Undergraduate Degree

			GPA			
			Attempted	Earned	Units	Points
Term GPA	2.58	Term Totals	5.50	5.00	5.00	12.90
Cumulative GPA	3.36	Cumulative Totals	30.52	30.02	30.02	100.80
		Transfer Totals	4.00	4.00	0.00	0.00
		Combined Totals	34.52	34.02	30.02	100.80

Spring 2014

Course	Description	Attempted	Earned	Grade	Points
ECON 202	Statistics	1.00	1.00	C+	2.30
EDUC 225	Educational Leadership	1.00	1.00	A-	3.70
PSY 311	Research in Behavioral Neurosc	1.00	1.00	A	4.00
PSY 311	Research in Behavioral Neurosc	0.00	0.00		0.00
RCOL 102	Readers College II (spring)	0.50	0.00	NC	0.00
Course Topic:	Unwired				
SPAN 332	Literatura infantil	1.00	0.00	W	0.00
Req Designation:	Service Learning Course				

			GPA				
			Attempted	Earned	Units	Points	
Term GPA	3.33	Term Totals	4.50	3.00	3.00	10.00	
Cumulative GPA	3.36	Cumulative Totals	35.02	33.02	33.02	110.80	
			Transfer Totals	4.00	4.00	0.00	
			Combined Totals	39.02	37.02	33.02	110.80

Term Honor: President's Leadership Award

FEDERAL LAW PROHIBITS ACCESS TO THIS RECORD BY ANY PARTY WITHOUT WRITTEN CONSENT OF THE STUDENT.

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SYRACUSE UNIVERSITY

Office of the Registrar

Academic Transcript

O'Leary, Tess M 38860-8749 Transcript Print Date: 06/13/2021
Graduate Record

Major: International Relations

Fall 2020-International Relations

Negotiatn:Theory & Practice ANT624 3.0 A
International Actors & Issues PAI710 3.0 A-
NGO Mgmt in Develop Countries PAI763 3.0 A
Attempted: 9.0 Earned: 9.0 GrPts: 35.0010 GPA: 3.889

Spring 2021-International Relations

Independent Study PAI690 1.0
Research Design for IR PAI705 3.0 A-
US Defense Strategy PAI739 3.0 A
Attempted: 7.0 Earned: 6.0 GrPts: 23.0010 GPA: 3.834

** Graduate Record Credit Summary **

Total Units Earned: 15.000 GPA Credits: 15.0
Transfer Credit: 0.000 Grade Points: 58.0020
Other Credit: 0.000 Cumulative GPA: 3.867

End of Graduate Record

The Official transcript paper version is printed on security paper. The Official e-Transcript is delivered as a secured PDF document that certifies the authenticity. The University Registrar's signature and Syracuse University seal appear on the right. The Official transcript may not be released without the written consent of the student.



Tess M O'Leary

University Registrar

SYRACUSE UNIVERSITY, Transcript Office, 109 Steele Hall, Syracuse, New York 13244-1120 (315) 443-2422

OFFICIAL TRANSCRIPTS: Transcripts are prepared by the Registrar's Office in accordance with policies of the American Association of Collegiate Registrars and Admissions Officers. Transcripts show only those credits earned at Syracuse University and those credits transferred from other institutions that are applied to the Syracuse degree program. Official transcripts are imprinted with the seal of the University and the signature of the University Registrar. A raised seal is not required. Without the seal and signature, this document is not an official transcript.

GRADE REPORTS: Grade reports show only courses and grades for a specific semester. Grade reports may also be used as supplements to transcripts which were previously requested by the student. Official grade reports also are imprinted with the seal of the University and the signature of the University Registrar.

3rd PARTY RELEASE OF A TRANSCRIPT OR GRADE REPORT: This transcript or grade report has been forwarded to you with the understanding that it will not be released to other parties. The federal Family Educational Rights and Privacy Act of 1974 prohibits release of this information without the student's written consent. Please return the transcript to Syracuse University if you are unable to comply with this condition.

DEGREES AND HONORS: Degree completion is signified on the transcript by an award date printed next to the degree name. **UNDERGRADUATE PROGRAM HONORS**, designated by the notation "HON" printed after the major, indicates that the student was part of the Honors Program and received honors in that field. **UNDERGRADUATE DEPARTMENTAL DISTINCTION**, designated by the notation "DPT" printed after the major, indicates that the student received distinction in that field. **UNDERGRADUATE UNIVERSITY HONORS** are awarded upon degree certification to students earning a superior cumulative GPA: Cum Laude, GPA 3.2 to 3.49 (Architecture), 3.4 to 3.59 (all other); Magna Cum Laude, GPA 3.5 to 3.79 (Architecture), 3.6 to 3.79 (all other); Summa Cum Laude GPA 3.8 to 4.0 (all schools). These designations appear next to the degree award date.

COURSE NUMBERING SYSTEM: Effective September 1968: **001-099:** When the semester heading reads "Semester Abroad", these are credit-bearing courses taken through the Syracuse University Abroad program. Under all other semester headings, these are remedial and non-credit courses; **100-199:** freshman level; **200-299:** sophomore level; **300-499:** junior and senior level; **500-599:** joint undergraduate and graduate; **600-699:** first-year graduate level; **700-899:** second and third-year graduate level; **900-996:** readings, research, and individual study courses at the doctoral level only; **997:** master's thesis; **998:** individual study at the graduate level; **999:** doctoral dissertation. Prior to September 1968, the course numbering system was **000-099:** lower division undergraduate; **100-199:** upper division undergraduate; **200-299:** joint undergraduate and graduate; **300-399:** graduate.

CREDIT: A unit of credit is represented by the semester hour, which stands for one class period of fifty (50) minutes in length for fifteen (15) weeks or the equivalent.

GRADE POINT AVERAGE: The grade point average (GPA) is calculated by dividing the number of grade points earned by the number of credits attempted.

GRADE	GRADE POINTS PER CREDIT	OTHER GRADING SYMBOLS	MEANING	GRADE POINTS PER CREDIT
A	4.0	AU	Audit	Not counted
A-	3.6666	H	Honors (Law only)	Not counted
B+	3.3333	HH	High Honors (Law only)	Not counted
B	3.0	I	Incomplete	0
B-	2.6666	NA	Did not attend	Not counted
C+	2.3333	NR	Not required	Not counted
C	2.0	P, P*	Passing	Not counted
C-	1.6666	RM	Remedial	Not counted
D (Undergraduate & Law only)	1.0	V	Variable length course – grade not yet due	Not counted
D- (Law only)	.6666	WD	Withdrew	Not counted
F	0			

Prior to January 1981, **NA**'s counted as **F**'s. Prior to August 2017 **NA** indicated Did not attend/withdraw. Obsolete symbols that may appear on older transcripts include **NC** (no credit, not counted for GPA); **S** (satisfactory, not counted); **U** (unsatisfactory, 0 points); **WF** (withdrew failing, 0 points); and **WP** (withdrew passing, not counted). As of September 1987, the grading system was expanded to include plus (+) and minus (-) grades as shown above for all non-Law courses. For Spring 2020, due to changes necessitated by response to the COVID-19 pandemic, Passing grades were assigned as P*.

SPECIAL CODES	DESCRIPTION
(ar)	Course credit is not included in Units Earned or GPA Credits and grade points are not included in GPA calculation, in accordance with Academic Renewal policy.
(g)	This is a graduate level course taken by an undergraduate who has not been admitted to a graduate program at SU. It is not used to fulfill undergraduate degree requirements. The course credits count towards units earned, GPA credits, and the grade points are included in the GPA calculation.
(gn)	This is a graduate level course taken by an undergraduate admitted to a graduate program at SU. It is not used to fulfill undergraduate degree requirements and the credits may be transferred into the graduate record. On the undergraduate record, course credit is not included in Units Earned or GPA credits and grade points are not included in GPA calculations.
(n)	Course credit is not included in Units Earned or GPA Credits and grade points are not included in GPA calculations.
(r)	This is a retaken course and the credits and grade points are included in all calculations.
(un)	This is an undergraduate course taken by a graduate student. It does not count towards a graduate degree.
(HNR)	This is an Honors section of the course.
(X)	The F grade on this class is the result of a violation of the Academic Integrity Policy.

ENGINEERING AND COMPUTER SCIENCE COOPERATIVE EDUCATION PROGRAM consists of work experience in several segments, represented on the transcript as ECS 370/470/570, Professional Practice. A minimum of two work segments satisfy program requirements.

COLLEGE OF LAW: Prior to September 1999, Law courses could be given plus (+) grades. A grade of 'B+' earned 3.5 grade points per credit and a 'C+' earned 2.5 grade points per credit. As of September 1999 Law courses follow the plus/minus (+/-) grade system shown above. As of fall 2011, Law grading system expanded to include D-. College of Law students are ranked each semester and the class rank is displayed below the semester statistics. College of Law also places students with an appropriately high semester GPA on the Dean's List. This designation is displayed below the statistics for the semester.

COLLEGE OF LAW HONORS: Summa Cum Laude, GPA 3.55 and above; Magna Cum Laude, GPA 3.35 to 3.54; Cum Laude, GPA 3.00 to 3.34. The requisite minimum honors grade point average may have been increased in any year to assure that not more than 2% of any graduating class graduated summa cum laude, not more than 10% of any graduating class graduated either summa cum laude or magna cum laude, and not more than 25% of any graduating class graduated with honors. In calculating graduation honors, grade point averages at the College of Law are rounded to the nearest hundredth.

REGTRNLEG 05012020

June 21, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is with pleasure that I recommend Tess O'Leary for a clerkship in your chambers.

As you can see from her application materials, Tess is a strong student. She ranks in the top echelon of her law school class. She is also concurrently pursuing a Master of Arts in International Relations at the highly regarded Maxwell School of Citizenship and Public Affairs. Tess has excelled in her Maxwell coursework just as she has in her law classes. In addition, Tess has well-developed interests in national security and counter-terrorism law, and she has been very active as an extern and student association member in these areas.

My own experience with Tess is entirely consistent with her impressive record. I first met her in the spring semester of her 1L year when she enrolled in my Constitutional Law lecture course. My course, like many doctrinal law courses, relies on a modified kind of Socratic method. Although I do lecture, I also frequently call on students and question them on the reading. This style of teaching keeps students engaged and focused on class discussion. It also tends to reveal how well students can express complex ideas under pressure.

Tess distinguished herself from the start of class. She was well prepared for every session, and she responded to questions with thought and care. She also regularly volunteered to speak when other students were struggling to answer. In doing so, Tess often demonstrated great analytical ability as well as genuine engagement. I was hardly surprised when she wrote an exceptional final exam. She earned an A- for the course—a true mark of excellence under our 1L grading curve.

Given Tess's performance, I was delighted to hire her as a Teaching Assistant for my undergraduate course, Elements of Law. Elements of Law is designed to prepare lower division undergraduates for further study of law and legal institutions in departments across the College of Arts and Sciences. Because of its interdisciplinary aims, Elements of Law covers a diversity of topics, including the core components of legal reasoning; the relationship between law, coercion, and morality; the origins and consequences of judicial bias; the public's conflicting perceptions of law; and the folk wisdom of lawyer jokes.

As a TA for Elements of Law, Tess led a discussion section each week, held office hours, taught the fundamentals of analytical writing, and graded student papers. Due to the restrictions of the pandemic, Elements of Law had to be transitioned from its typical in-person modality to a completely online format. The move to distance learning, in addition to all the of the disruptions and difficulties of the pandemic itself, presented substantial challenges for both students and instructors.

Tess managed the challenges very well. Several of her students experienced significant problems due to illness and the complications of online learning. Tess worked with these students throughout the semester, offering extra office hours and additional writing workshops. In doing so, Tess ensured that the struggling students had the support they needed to be successful. I was quite impressed. I have already hired Tess as a TA for next year and I am very much looking forward to working with her again.

As I hope this letter makes clear, I have a high opinion of Tess. I can attest to her analytical ability, writing skill, work ethic, professionalism, and personability. I think she would be a truly great asset as a clerk in any judicial chambers.

If you have any questions or if you would like to discuss Tess at further length, please feel free to contact me at 315-443-2529 or kjbybee@syr.edu.

Sincerely,

Keith J. Bybee
Vice Dean, College of Law
Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor, College of Law
Professor of Political Science, Maxwell School of Citizenship and Public Affairs
Director, Institute for the Study of the Judiciary, Politics, and the Media

Bybee Keith - kjbybee@syr.edu

June 21, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend my student, Tess O'Leary, for a clerkship in your chambers. Tess was an excellent class participant in my 80-person Criminal Procedure course this spring. This class was held entirely on Zoom because of the pandemic, and I found that student participation, which always makes in-person classes more engaging, was even more important in the virtual space. I was pleased at the way that the students all stepped up their participation and Tess was one of the students who earned the highest scores for her insightful contributions to our class discussions. She was well prepared for class and her sharp and thoughtful comments (whether the product of cold-calling or volunteering) reflected her mastery of the material and her ability to engage with a complicated and often conflicting set of cases. Tess also was active on the classroom discussion board where she identified and analyzed current cases that illustrated (or sometimes challenged) the material we were covering in class. Tess also wrote a strong exam and easily earned an A for the course.

I am also impressed with the breadth of Tess's work experience and volunteer commitments both before and during law school. Her legal work experience, academic pursuits, and volunteer/pro bono work demonstrate her commitment to public service. Her work and life experiences also clearly informed Tess's engagement with our course material. She brought practical, policy-based insights to her analyses of caselaw that sharpened her ability to draw out the key issues in the doctrine. I look forward to teaching her this fall in my Criminal Justice Reform seminar.

I believe Tess will be an excellent law clerk and colleague. Please do not hesitate to contact me with any questions about her application.

Sincerely,

Laurn P. Gouldin

Laurn Gouldin - lgouldin@syr.edu - 315-443-9547



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel
600 Independence Ave, SW
Washington, DC 20591

Phone: 202-267-0527
Fax: 202-267-1298
E-mail: Maria.Surdokas@faa.gov

August 14, 2020

To Whom it May Concern:

I am an attorney in the Employment and Labor Law Division in the Federal Aviation Administration's (FAA) Office of the Chief Counsel. Ms. Tess O'Leary was our 2020 summer honors intern. Through this honors intern program, Ms. O'Leary has had the opportunity to draft several documents on behalf of attorneys in our office. Ms. O'Leary has our permission to use the redacted copy of the June 23, 2020 Opposition to Appeal, which she drafted and I filed with the Equal Employment Opportunity Commission's Office of Federal Operations.

Sincerely,

A handwritten signature in blue ink that reads "Maria Surdokas".

Maria Surdokas

**UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS**

JOHN DOE,)	
)	
Complainant,)	DOT No.
)	
v.)	Docket No.
)	
ELAINE L. CHAO, SECRETARY,)	June 23, 2020
U.S. Department of Transportation,)	
)	
Agency.)	
)	

AGENCY'S OPPOSITION TO COMPLAINANT'S APPEAL

I. INTRODUCTION

The Complainant, Mr. John Doe ("Complainant") appeals the Federal Aviation Administration's ("Agency") Final Agency Decision ("FAD") dismissing his complaint because Complainant failed to comply with the time limits set forth by the Equal Employment Opportunity Commission ("EEOC"). The Agency opposes this appeal and requests that the Office of Federal Operations ("OFO") upholds the FAD based on the following.

II. PROCEDURAL HISTORY

1. On December 5, 2019, Complainant made initial contact with an Agency EEO counselor and made the following allegations against the Agency: Were you discriminated against based on your age (61, DOB: 06/30/1958) when, on August 2, 2019, you were told that your desk audit did not support a pay/grade increase for your position? Administrative File 23, 13.

2. On March 6, 2020, the Agency sent Complainant a Notice of Right to File (“NORF”) a formal complaint. Administrative File 29. Complainant received the NORF on March 13, 2020. Administrative File 29.
3. On March 27, 2020, Complainant filed his complaint of discrimination. Administrative File 59.
4. On April 24, 2020, the Agency’s Departmental Office of Civil Rights (“DOCR”) dismissed Complainant’s complaint because he failed to comply with the applicable time limits contained in 29 C.F.R. § 1614.105. Administrative File 13. Complainant was notified of DOCR’s decision via a dismissal letter enclosing the FAD. Administrative File 13.
5. On May 25, 2020, Complainant filed an Appeal to Dismissal with the Office of Federal Operations (“OFO”). Administrative File 4. The appeal included an argument in support of his appeal. Administrative File 4.
6. On June 2, 2020, DOCR sent a letter to OFO with information that the relevant files had been uploaded to the EEOC’s FedSEP portal electronic filing system. Administrative File 1.

III. LEGAL ARGUMENT

A. Standard of Review

An appeal of an Agency’s final decision or dismissal pursuant to 29 C.F.R. § 1614.107 will be reviewed *de novo*. Management Directive 110, Chapter 9(VI)(A); 29 C.F.R. § 1614.405.

B. The Agency Properly Dismissed Complainant’s Complaint Because Complainant Failed to Make Timely Contact with an EEO Counselor as Required by 29 C.F.R. § 1614.105.

An agency may dismiss a complaint pursuant to 29 C.F.R. § 1614.107(a)(2) if an aggrieved person has not made timely contact with an EEO counselor. According to 29 C.F.R. § 1614.105(a)(1), “an aggrieved person must initiate contact with a[n EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.” To determine the triggering date of an allegedly discriminatory matter, the Commission uses a “reasonable suspicion” standard, meaning the filing period “is not triggered until a complainant should reasonably suspect discrimination, but before all the facts that would support a charge of discrimination have become apparent.” *Howard v. Dep’t of the Navy*, EEOC No. 01965648 at *2 (February 11, 1999).

The clock started ticking in Complainant’s case on August 2, 2019, when he received his Desk Audit results from the Agency’s Human Resources Office (“AHR”), the most recent act in what Complainant described as “the culmination of the process that has occurred to our workgroup on the basis . . . that we have come from an “aging Flight Service Station” background.” Administrative File 27. Complainant’s suspicion demonstrates that he had reasonable belief of alleged discrimination on the basis of age at the time he received his Audit results. EEOC procedural rules required Complainant to make initial contact with an EEO counselor within 45 days of receiving that desk audit decision – September 16, 2019. 29 C.F.R. § 1614.105(a)(1). Complainant did not make contact until December 5, 2019, a full 125 days after receiving the Audit decision. Administrative File 23. Furthermore, the other acts Complainant raises as background to his desk audit claim range from October of 2018 through September of 2019, all well before the December 5, 2019 contact with the EEO counselor. *See generally* Administrative File.

Complainant believes that his 45-day filing period began on November 29, 2019, rather than August 2nd, because that is the day his supervisor informed him that AHR refused to meet and discuss the audit decision. *See* Administrative File 14. That belief is incorrect, however, as “the Commission has consistently held that the utilization of alternative agency procedures, union grievances, and other remedial processes does not toll the time limit for contacting an EEO counselor.” *Torie v. Department of the Navy*, EEOC Appeal No. 0120160557 (February 18, 2016), *citing Ellis v. United States Postal Service*, EEOC Appeal No. 01992093 (November 29, 2000). Because Complainant’s efforts to seek an internal appeal, albeit unofficial, of his classification does not affect the 45-day requirement, the Agency properly dismissed his complaint for untimely contact with an EEO counselor.

On appeal, Complainant does not address the untimeliness of his initial EEO contact.¹ Administrative File 4-5. Rather, Complainant appears to be complaining that “a diligent and comprehensive investigation [into the merits of his claim] does not appear to have occurred.” Administrative File 4. The majority of Complainant’s appeal brief focuses on an investigation that never occurred because DOCR dismissed the claim on procedural grounds.² Administrative File 14. In accordance with 29 C.F.R. § 1614.107, the Agency does not investigate the merits of a claim that is dismissed on procedural grounds. Administrative File 13. On January 10, 2019, Complainant received a memo that explained the EEO counselor’s role in the initial interview process, which did not include investigation into the merits of the claim. Administrative File 32-6. Complainant was notified that DOCR will only open an EEO investigation if the complaint

¹ Complainant’s only statement about timeliness refers to a mistaken belief that his appeal may have been untimely. Administrative File 5.

² Complainant also states that there may have been communication issues between DOCR and his representative. Administrative File 5. The Agency notes that Complainant’s representative is an Agency employee, who also served as one of Complainant’s managers in 2019, during the Desk Audit process. Administrative File 27. Moreover, the record shows that Complainant received all correspondence from DOCR regarding his complaint. Administrative File 2, 6, 9, 37, 43, and 56.

was accepted. Administrative File 34. Therefore, Complainant's contentions challenging the investigation are irrelevant because the complaint was not accepted and no EEO investigation took place.

IV. CONCLUSION

The EEOC has set forth clear time limits for aggrieved persons to initiate the EEOC complaint process. In this case, Complainant's 45-day window to make contact with an EEO counselor began running on August 2, 2019, when he received the Desk Audit decision from AHR. *See* 29 C.F.R. § 1614.105(a)(1). The fact that Complainant took alternate steps to try to resolve the issue did not toll the 45-day requirement. Ultimately, Complainant sought EEO counseling 125 days after the most recent act in his allegations of continued harassment amounting to a hostile work environment.

The Agency properly dismissed Complainant's case pursuant to 29 C.F.R. § 1614.107(a)(2). Accordingly, the Agency requests that the Office of Federal Operations upholds the Final Agency Decision in this matter.

Respectfully submitted,

Maria Surdokas
Agency Representative

Federal Aviation Administration
Office of the Chief Counsel, AGC-100

Applicant Details

First Name	John											
Middle Initial	K											
Last Name	Osborne											
Citizenship Status	U. S. Citizen											
Email Address	osbojk19@wfu.edu											
Address	<table> <tr> <th>Address</th> </tr> <tr> <td>Street</td> </tr> <tr> <td>530 North Patterson Avenue, APT 435</td> </tr> <tr> <td>City</td> </tr> <tr> <td>Winston-Salem</td> </tr> <tr> <td>State/Territory</td> </tr> <tr> <td>North Carolina</td> </tr> <tr> <td>Zip</td> </tr> <tr> <td>27101</td> </tr> <tr> <td>Country</td> </tr> <tr> <td>United States</td> </tr> </table>	Address	Street	530 North Patterson Avenue, APT 435	City	Winston-Salem	State/Territory	North Carolina	Zip	27101	Country	United States
Address												
Street												
530 North Patterson Avenue, APT 435												
City												
Winston-Salem												
State/Territory												
North Carolina												
Zip												
27101												
Country												
United States												
Contact Phone Number	6098468109											

Applicant Education

BA/BS From	Wake Forest University
Date of BA/BS	May 2017
JD/LLB From	Wake Forest University School of Law
	http://www.law.wfu.edu
Date of JD/LLB	May 16, 2022
Class Rank	Below 50%
Law Review/Journal	Yes
Journal(s)	Wake Forest Journal of Business & Intellectual Property Law
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
--------------------------------------	-----------

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

References

Lumi Nodit: 206-254-0568, lumi.nodit@atg.wa.gov;

Melissa Spangler: 727-639-9797,
melissa.spangler@raymondjames.com;

Margaret Burnham: 336-387-5116, MBurnham@nexsenpruet.com

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

J. Keenan Osborne IV
121 East Woodland Avenue
Cape May Court House, NJ 08210

May 3, 2022

The Honorable Judge Elizabeth W. Hanes
Spottswood W. Robinson III and
Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a graduating third-year law student at Wake Forest University School of Law and a member of the *Wake Forest Journal of Business & Intellectual Property Law*. I am writing to apply for a 2022-2023 clerkship with your chambers.

Having spent the majority of the last decade living in North Carolina, I am keenly interested in staying in the Mid-Atlantic long term. Both my sisters went to school at James Madison University and live in Virginia. As the Clerkship chair of Wake Forest's Chapter of the American Constitution Society, I have been keenly interested in a clerkship. As a participant in the 2020 North Carolina Court of Appeals Summer Appellate Seminar led by Hon. Dietz and Hon. Berger, I gained meaningful insight into a judge's chambers. I have earned high marks in both Civil Procedure and Constitutional Law, among other courses. Additionally, I have been awarded Wake Forest's *David Shores Scholarship in Taxation and Antitrust* and will be published in an upcoming issue of the *Wake Forest Journal of Business & Intellectual Property Law*. Finally, I spent my last semester of law school working in the Antitrust division of the Washington State Office of the Attorney General. In this capacity I worked on several large and ongoing multistate suits, which has solidified my interest in clerking.

Enclosed please find my resume, law school transcript, and writing sample. The writing sample is a memorandum I wrote during my summer internship with the North Carolina Democratic Party. The memorandum addresses how North Carolina H.B. 1169 and its amendments to ID laws could affect the ongoing voter ID litigation

Thank you for considering my application. Please feel free to contact me if I can provide you with any additional information.

Respectfully,

J. Keenan Osborne IV

J. Keenan Osborne IV

J. Keenan Osborne IV

121 East Woodland Avenue | Cape May Court House, NJ 08210 | osbojk19@wfu.edu | 609-846-8109

EDUCATION

Wake Forest University School of Law, Winston-Salem, NC **May 2022**
Juris Doctor Candidate, GPA: 3.27

Honors:

Dean Suzanne Reynolds Award for the highest grade in Antitrust Law
David Shores Scholarship in Taxation and Antitrust

Publications:

Growing Industry: Analyzing the 2018 Farm Bill's possible legalization of Delta-8 THC, WAKE FOREST J. BUS. & INTELL. PROP. L. (forthcoming).

Activities:

Wake Forest Journal of Business & Intellectual Property Law, Staff; American Constitution Society, Clerkship & Networking Chair; Pro bono project: COVID Unemployment Insurance Program; 2020 Court of Appeals Summer Appellate Seminar, Participant

Wake Forest University, Winston-Salem, NC **May 2017**
Bachelor of Arts in Economics, May 2017
 Minors: German Studies, Political Science & International Affairs

Activities:

Euzelian Literary Society, President; Student Budget Advisory Committee, Representative; Honor & Ethics Council, Hearing Panelist

EXPERIENCE

Antitrust Law Clerk Extern, **Washington State Attorney General's Office**, Seattle, WA **Spring 2022**

- Composed deposition summaries and annotated exhibits for ongoing investigations and litigation.
- Shadowed attorneys during depositions of multistate antitrust litigation.
- Researched product market and geographic market for merger approval investigations.

Transactional Law Intern, **San Jose City Attorney's Office**, San Jose, CA **Summer 2021**

- Prepared draft amendments to loan documents for affordable housing financing following partition actions.
- Drafted memorandum on municipal liability of non-navigable water management and the NPDES permitting process under the Clean Water Act.
- Assisted in the preparation of and attended Regional Water Board and City Council meetings.

Trust Law Clerk, **Raymond James Trust, N.A.**, St. Petersburg, FL **Summer 2021**

- Reviewed Complaints and briefed the General Counsel on state law for pending litigation.
- Created and updated 50 State Surveys on Trust & Estates and Charitable Tax Law.
- Performed document reviews, formatted, and edited the General Counsel's notes and memorandum.

Legal Intern, **North Carolina Democratic Party**, Raleigh, NC **Summer 2020**

- Performed legal research and drafted memoranda on issues of state and federal election law.
- Updated and revised outline document summarizing relevant NC election laws following changes in the law related to COVID-19.
- Compiled a database/tracker of ongoing election and voting rights litigation.

Database Analyst, **Moore & Van Allen, PLLC**, Charlotte, NC **Oct. 2018-July 2019**

- Prepared accurate and timely reports for the executive director and practice team leaders, including firm net profitability, aged accounts receivable summaries, client origination costs, etc.
- Ensured security of data by managing firm-wide employee access to client files and matters.
- Applied hard costs to client-matters, managed client bills within attorney workflows, and audited write-offs.
- Supported the firm-wide database conversion from Thomson Reuters Elite Enterprise to Aderant Expert.

Purchasing Agent, **Zentra, LCC**, Matthews, NC **Oct. 2017-Oct. 2018**

HOBBIES & INTERESTS

Urban Design, Travel, Soccer, Baseball, Basketball

NOFFIC

WAKE FOREST UNIVERSITY SCHOOL OF LAW

Office of the Registrar
P. O. Box 7206, Winston-Salem, NC 27109
Phone: 336-758-5443; Fax: 336-758-4362

ACCREDITATION: Wake Forest University School of Law is fully accredited by the American Bar Association and is a member of the Association of American Law Schools.

CALENDAR: The academic year of the School of Law consists of two semesters of 14 or 15 weeks each. Summer school normally consists of two five-week sessions. Foreign summer programs consist of one four-week session each.

UNIT OF CREDIT: Credit is recorded in semester hours.

COURSE NUMBER SYSTEM: Courses numbered 100-199 are required first-year courses. Courses numbered 200-899 are upper-level required and/or elective courses. Accepted transfer credits may be numbered 900-999, unnumbered and indicated as such, or Wake Forest equivalent courses.

GRADING SYSTEM

A+	4.00	C-	1.67	F	Fail
A	4.00	D+	1.33	AU	Audit
A-	3.67	D	1.00	I	Incomplete
B+	3.33	D-	0.67	NC	No Credit
B	3.00	F	0.00	S	Satisfied
B-	2.67	H	Honors	TR	Transfer Credit Accepted
C+	2.33	P	Pass	W	Withdrew from course
C	2.00	LP	Low Pass	WD	Withdrew from school

GRADE SUFFIX: V Waived; X Course not calculated in GPA; * Grade not calculated in GPA, credit earned only.

For classes graduating prior to 2019, see: <http://registrar.law.wfu.edu/policies/>.

All attempted courses are recorded. The grade point average is calculated by dividing the total quality points by the total hours attempted. Courses taken on a Pass/Fail basis, or those with a grade of Incomplete are not included in the calculation of the grade point average.

Policies regarding all degree programs may be found on the Law School website at:
<http://law.wfu.edu/>.

(Revised August 22, 2017)

Wake Forest University

Office of the University Registrar
PO Box 7207
Winston-Salem, NC 27109
Phone: 336-758-5207
Email: registrar@wfu.edu

Wake Forest University Official Transcript
Statement of Authenticity

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OFFICIAL TRANSCRIPT



WAKE FOREST
UNIVERSITY

Office of the University Registrar
P.O. Box 7207
Winston Salem NC 27109-7207

Student Name: **John Keenan Osborne, IV**

ID: 06456736 Birthdate: 10/03
Majors: Economics

Entry Date: 08/26/2013
Certificates and
Foreign Area Studies

Minors: Politics & Int'l Affairs
German Studies

Undergraduate Division

Date Printed 06-JAN-2020

Page: 1

Issued To: John K Osborne IV
Parchment: 26363652

Course Level: Undergraduate

Degrees Awarded Bachelor of Arts 15-MAY-2017
Ehrs: 120.00 GPA-Hrs: 107.00 QPts: 325.640 GPA: 3.043
Primary Degree
Major : Economics

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
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TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

Fall 2013 Advanced Placement Credit

WRI 111	Writing Seminar	4.00 AP	
Ehrs: 4.00	GPA-Hrs: 0.00	QPts: 0.000	GPA: 0.000

Summer 2014 Rowan University

MTH 111	Calculus/ Analytic Geom I	4.00 TC	
Ehrs: 4.00	GPA-Hrs: 0.00	QPts: 0.000	GPA: 0.000

INSTITUTION CREDIT:

Fall 2013			
CHM 111	College Chemistry I	3.00 C-	0.000 E
CHM 111L	College Chemistry I Lab	1.00 B-	2.670
HES 101	Exercise for Health	1.00 A	4.000
HST 108	Americas and the World	3.00 C+	6.990
MTH 105L	Fundament Alg Trig Lab	2.00 P	0.000
WRI 210	Academic Research and Writing	3.00 B+	9.990
Ehrs: 10.00	GPA-Hrs: 8.00	QPts: 23.650	GPA: 2.956

Spring 2014			
ECN 150	Introduction to Economics	3.00 B-	8.010
FYS 100	Think Like a Doctor	3.00 A	12.000
HES 100	Lifestyles and Health	1.00 A	4.000
PSY 151	Introductory Psychology	3.00 B-	8.010
REL 102	Introduction to the Bible	3.00 A-	11.010
Ehrs: 13.00	GPA-Hrs: 13.00	QPts: 43.030	GPA: 3.310

Fall 2014			
CHM 111	College Chemistry I	3.00 C	6.000 I
GER 111	Elementary German	4.00 B+	13.320
HES 160	Beginning Golf	1.00 A	4.000
LIB 100	Accessing Info in 21st Cent	1.50 A	6.000
MUS 101	Introduction to Western Music	3.00 B+	9.990
Ehrs: 12.50	GPA-Hrs: 12.50	QPts: 39.310	GPA: 3.144

Spring 2015			
GER 112	Elementary German	4.00 B-	10.680

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
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Institution Information continued:

GES 340	German Masterworks in Trans	3.00 A	12.000
MTH 109	Elementary Probability & Stats	4.00 C+	9.320
POL 113	American Government & Politics	3.00 B	9.000
POL 116	International Politics	3.00 B	9.000
Ehrs: 17.00	GPA-Hrs: 17.00	QPts: 50.000	GPA: 2.941

Fall 2015

COM 335	Survey of Organizational Comm.	3.00 B	9.000
ECN 205	Intermediate Microeconomics I	3.00 C+	6.990
ECN 207	Intermediate Macroeconomics	3.00 D-	0.000 E
GER 153	Intermediate German	4.00 B-	10.680
POL 253	Intl Political Economy	3.00 B-	8.010
Ehrs: 13.00	GPA-Hrs: 13.00	QPts: 34.680	GPA: 2.667

Spring 2016

CNS 320	Strategic Job Search Processes	1.50 A	6.000
ECN 206	Intermediate Microeconomics II	3.00 C+	6.990
ECN 272	Austrian Economics	3.00 A	12.000
ESE 101	Foundation of Entrepreneurship	3.00 C+	6.990
GER 210	Encounters w/German World	3.00 B+	9.990
POL 237	Comp Politics of Welfare State	3.00 B	9.000
Ehrs: 16.50	GPA-Hrs: 16.50	QPts: 50.970	GPA: 3.089

Fall 2016

ECN 207	Intermediate Macroeconomics	3.00 B	9.000 I
ECN 261	American Economic Development	3.00 B	9.000
ECN 274	Topics in Macroeconomics	3.00 B+	9.990
GES 394	German Myth Legend Fairy Tales	3.00 A-	11.010
POL 210	TopUS:FoodPolitics&Policy	3.00 B+	9.990
Ehrs: 15.00	GPA-Hrs: 15.00	QPts: 48.990	GPA: 3.266

Spring 2017

ECN 209	Applied Econometrics	3.00 C	6.000
ECN 222	Monetary Theory and Policy	3.00 A-	11.010
ECN 224	Law and Economics	3.00 B	9.000
POL 231	Western European Politics	3.00 B	9.000
POL 261	International Law	3.00 P	0.000
Ehrs: 15.00	GPA-Hrs: 12.00	QPts: 35.010	GPA: 2.917

***** CONTINUED ON PAGE 2 *****

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In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agent or employees, will not permit any other party access to this record without consent of the student. Alterations of this transcript may be a criminal offense.

Harold L. Pace, Ph.D.
University Registrar

OFFICIAL TRANSCRIPT



WAKE FOREST
UNIVERSITY

Office of the University Registrar
P.O. Box 7207
Winston Salem NC 27109-7207

Student Name: **John Keenan Osborne, IV**

ID: 06456736 Birthdate: 10/03
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Entry Date: 08/26/2013
Certificates and
Foreign Area Studies

Minors: Politics & Int'l Affairs
German Studies

Undergraduate Division

Date Printed 06-JAN-2020

Page: 2

***** TRANSCRIPT TOTALS *****

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL	112.00	107.00	325.640	3.043
INSTITUTION				
TOTAL	8.00	0.00	0.000	0.000
TRANSFER				
OVERALL	120.00	107.00	325.640	3.043

***** END OF TRANSCRIPT *****

AN OFFICIAL SIGNATURE IS WHITE WITH AN OLD GOLD BACKGROUND

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In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agent or employees, will not permit any other party access to this record without consent of the student. Alterations of this transcript may be a criminal offense.

Harold L. Pace, Ph.D.
University Registrar

WAKE FOREST UNIVERSITY CEEB Code = 5885 FICE Code = 002978 Email: registrar@wfu.edu Website: registrar.wfu.edu Phone: (336) 758-5207 Fax: (336) 758-6056

For questions or further information, contact the Office of the University Registrar at PO Box 7207, Winston-Salem, NC 27109. The Office of the University Registrar issues official transcripts for all Undergraduates and the Graduate, Divinity and Business Schools.

VALUE SYSTEM

From Fall 1975 to Summer 2001, the undergraduate school awarded course credits. Credits may be converted into conventional semester hours by multiplying the assigned credits by 0.9 (i.e., 4 credits= 3.6 semester hours). Students matriculating in the undergraduate schools beginning in Fall 2001 receive semester hours. The Graduate and Divinity Schools award conventional semester hours.

After Fall of 1998, the undergraduate and graduate schools changed to a plus/minus grading scale. At that time, the Graduate School also changed from a 3.00 point scale to a 4.00 point scale. Graduate students who matriculated before Fall 1998 but were still enrolled as of Fall 1998 had all earlier grades converted to the 4.00 point scale.

TRANSFER CREDITS

Transfer credit may be counted toward the graduation requirements, but grades earned in the transfer course are not used in calculating the Wake Forest grade point average. The grades appearing on the Wake Forest transcript are the actual grades earned, but the units shown are only those accepted for transfer by Wake Forest.

Departmental abbreviations are listed in the Bulletins. Some courses transferred from other institutions may have abbreviations not found in the Bulletin.

Repeated courses are flagged I (included in GPA) or E (excluded in GPA). For classes taken and repeated at Wake Forest, only one grade remains in the cumulative grade point average, based on Bulletin regulations.

DEFINITION OF GRADES AND GRADE POINT VALUES

UNDERGRADUATE			GRADUATE			DIVINITY			BUSINESS (Graduate)		
Calculated in grade point average:			Starting with the fall 1997 semester, graduate level courses changed from 300, 400, and 500 level courses to the current 600, 700, and 800 level courses.			Calculated in grade point average:			Students who began the program prior to July 2009, are graded on a 9-point grading system. Students admitted after that date are graded on a 4-point grading system.		
Grade	Definition	Points	System Prior to Summer 1998			Grade	Definition	Points	Calculated in grade point average:		
A	Exceptionally high achievement	4.00	Calculated in grade point average:			A	Excellent	4.00	4 Point Grading System:		
A-		3.67	Grade	Points per Hour		A-		3.67	Grade	Points	
B+		3.33	A	3.00		B+	Commendable	3.33	A	4.00	
B	Superior	3.00	B	2.00		B-		2.67	A-	3.67	
B-		2.67	C	1.00		C+	Satisfactory	2.33	B+	3.33	
C+		2.33	C	0.00		C		2.00	B	3.00	
C	Satisfactory	2.00	Not calculated in grade point average:			C-	Unsatisfactory	1.67	B-	2.67	
C-		1.67	Grade	Definition		D	Failure	1.00	B	3.00	
D+		1.33	P	Passing		F	Incomplete	.00	B-	2.67	
D	Passing but unsatisfactory	.67	F	Failure in Pass/Fail mode		NR	Grade not reported	.00	C+	2.33	
F	Failure	.00	NR	Not reported in Satisfactory/Unsatisfactory mode		WF	Withdrawn Failing	.00	C	2.00	
I	Incomplete	.00	I	Incomplete in Satisfactory/Unsatisfactory mode		F.	Irreplaceable F	.00	F	.00	
NR	Grade not reported	.00	S	Satisfactory		Not calculated in grade point average:			Not calculated in grade point average:		
WF	Withdrawn Failing	.00	U	Unsatisfactory		P	Passing		I	Incomplete	
F.	Irreplaceable F	.00	AUD	Audit		FPF	Failure in Pass/Fail mode		P	Pass/Fail Course	
Not calculated in grade point average:			DRP	Drop approved by the Dean after regular drop period		IPF	Incomplete in Pass/Fail mode		AU	Audit	
EX	Exemption		NC	Non-credit non-grade courses		NRPF	Not reported in Pass/Fail mode		WD	Withdrawn from the University	
P	Passing		WP	Withdraw Passing		AUD	Audit		WP	Withdrawn passing from a course	
FPF	Failure in Pass/Fail grade mode		WF	Withdraw Failing		DR	Official drop approved by Dean		WF	Withdrawn failing from a course	
IPF	Incomplete in Pass/Fail grade mode		System after Summer 1998			WD	Withdrawal from the university		E	Exempt from a course	
NRPF	Not reported in Pass/Fail grade mode		Calculated in grade point average:			WP	Withdrawal Passing		T	Course transfer	
AU	Audit		Grade	Definition	Points	9 Point Grading System:			X	Course waived	
DR	Official drop approved by the Dean		A	Excellent	4.00	Grade		Points			
NC	Non-credit non-graded course		A-		3.67	A+		9			
WD	Withdrawal from the university		B+		3.33	A		8			
T (grade)	Transfer Credit		B	Good	3.00	A-		7			
TNS	Dual-Enrollment Transfer Credit		B-		2.67	B+		6			
W	Course Withdrawal		C+		2.33	B		5			
			C	Low Passing	2.00	B-		4			
			F	Failure	.00	C+		3			
			I	Incomplete	.00	C		2			
			NR	Grade not reported	.00	C-		1			
			Not calculated in grade point average:								
			ISU	Incomplete in Satisfactory/Unsatisfactory grade mode							
			P	Passing							
			FPF	Failure in Pass/Fail grade mode							
			IPF	Incomplete in Pass/Fail grade mode							
			NRPF	Not reported in Pass/Fail grade mode							
			NR	Not reported in Satisfactory/Unsatisfactory mode							
			S	Satisfactory							
			U	Unsatisfactory							
			AU	Audit							
			DR	Official drop approved by Dean							
			NC	Non-credit non-grade course							
			WD	Withdrawal from the University							
			WF	Withdrawal Failing							
			WP	Withdrawal Passing							

MEMORANDUM

To: General Counsel
From: Keenan Osborne
Date: June 11, 2020
RE: H.B. 1189 – Impact on Voter ID Litigation

QUESTION PRESENTED

Do the amendments in Section 10 of North Carolina H.B. 1169—which adds identification cards issued by the United States government’s departments, agencies, and entities as well as those issued by North Carolina state government public assistance programs to the list of valid voter IDs—effectively cure the existing voter ID statute so that it may now be considered constitutional?

BRIEF ANSWER

Likely no. Discriminatory intent analysis uses five non-exhaustive factors: (1) the historical background of the challenged decision, (2) the specific sequence of events leading up to the challenged decision, (3) the departures from normal procedural sequence, (4) the legislative history of the decision, and (5) whether the official action bears more heavily on one race than another. *Arlington Heights* at 166-67.

Holmes v. Moore (state court)

In *Holmes v. Moore*, the state appellate court weighed all factors in favor of granting an injunction. Although H.B. 1169 may address the fifth factor, it remains that the other four still favor granting the injunction.

State Conference of the NAACP v. Cooper (federal court)

And in *State Conference of the NAACP v. Cooper*, a federal judge, in granting the injunction, emphasized that the fifth factor weighs against the state for two reasons: (1) the lack of inclusion of public assistance IDs disproportionately affects voters of color, and (2) it will disproportionately dissuade voters of color because of the perception that they lack acceptable identification. Although

the inclusion of public assistance IDs in H.B. 1169 will directly address the judge's first concern on disproportionate impact, it does not address the judge's other concern or the four other factors.

FACTS

North Carolina H.B. 1169 is active legislation making its way through both chambers of the North Carolina legislature. It has one provision, Section 10, that would affect North Carolina voter identification requirements codified in N.C. Gen. Stat. 163-166.16(a). Section 10 would add identification cards issued by a department, agency, or entity of the United States government and those provided by North Carolina for state government programs of public assistance.

In the past, the North Carolina legislature has attempted to pass several forms of voter ID laws. In 2011, the General Assembly passed one which the governor at the time vetoed. In 2013, the House took up voter ID legislation again in H.B. 589. That year, following the *Shelby County v. Holder* decision, North Carolina no longer needed preclearance to make changes to voting procedures and subsequently "requested and received racial data" and expanded H.B. 589 to include more stringent ID requirements that excluded photo IDs more often used by African Americans. *NAACP v. McCrory* 831 F.3d at 216. It was passed into law by a party line vote before the Fourth Circuit struck it down as unconstitutional in 2016.

In 2018, Republican lawmakers placed a voter ID amendment on that November's ballot, which passed with fifty-five percent of the vote. In the same election, the Republicans retained control but lost their supermajorities in both legislative chambers. In the lame-duck period of 2018, the legislature passed S.B. 824, which the governor vetoed. Yet in one of its last legislative acts, the republican supermajority overruled the veto and enacted S.B. 824 as the voter ID laws in N.C. Gen. Stat. 163-166.16. That bill was written by many of the same legislators as H.B. 589.

Now, S.B. 824 is being challenged in both state and federal court, by *Holmes v. Moore* and *North Carolina Conference of the NAACP v. Cooper*, respectively. In both cases, the respective courts granted a preliminary injunction stopping the voter ID requirements from taking effect pending trial.

DISCUSSION

The amendments to N.C. Gen. Stat. 163-166.16 found in H.B. 1169 are unlikely to cure the existing voter ID statute so that it might now be considered constitutional. When granting the injunctions, both courts looked to the factors outlined in *Arlington Heights* to determine whether discriminatory intent motivated the legislation. Those same factors will be relied on at trial.

If discriminatory intent motivates a facially neutral law, that law is as unconstitutional as those that expressly discriminate on the basis of race. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977); *Washington v. Davis*, 426 U.S. 229, 241(1976). In assessing whether there is discriminatory intent, court weigh the following factors: (1) The historical background of the challenged decision, (2) the specific sequence of events leading to the challenged decision, (3) the departures from normal procedural sequence, (4) the legislative history of the decision, and (5) the disproportionate impact of the official action-whether it bears more heavily on one race than another. *Arlington Heights* at 166-67. In both ongoing cases, the courts found all five factors weighed in favor plaintiffs, at least for the purpose of the injunction.

The factors on the historical background and the sequence of events are linked. As the federal district court noted in *Cooper* and *McCrory*, North Carolina's "sordid history of racial discrimination" and recent patterns of official discrimination cannot be ignored in the analysis in these cases. *Cooper* at 22; *McCrory* at 223-27. There is also a linear sequence of events from the discriminatory H.B. 589 to S.B. 824. The current version of the voter identification law is the most recent piece in a series of voter laws passed by the North Carolina legislature to be contested. Many of the same people who relied on racial data in crafting H.B. 589 were also instrumental in later crafting S.B. 824. That commonality in

drafters weighs factors one, two, and four against S.B. 824 being constitutional and the amendment in H.B. 1169 does not alter this evaluation.

The third factor, the departure from normal procedures is not affected by H.B. 1169. For the ongoing litigation, the lame-duck senate passed S.B. 824 codifying the ballot-based amendment right before the close of its term. Outgoing Republican supermajorities in both houses were based on district maps the federal courts threw out before the 2018 elections as they discriminated on racial lines. *Covington v. North Carolina*, 267 F. Supp. 3d 664, 668 (M.D.N.C. 2017). This is likely a departure from the normal procedural sequence weighing factor three against S.B. 824 being constitutional. H.B. 1169 does not correct this wrong either.

The fifth factor, whether the action weighs more heavily on one race than another is impacted by H.B. 1169. In *Cooper*, the court outlined two reasons why this factor weighed against the state in the granting of the preliminary injunction. First, the court found that the lack of inclusion of public assistance IDs disproportionately affects voters of color, and second, it will disproportionately dissuade voters of color because of the perception that they lack acceptable identification. *Cooper* at 42. The inclusion of government assistance IDs is likely to create a closer degree of parity between effects on white and nonwhite voters possessing IDs, however it does not address the trial court judge's concern that S.B. 824 will still disproportionately deter voters of color. H.B. 1169 may thus affect a portion of how the fifth factor is weighed in the federal case but is unlikely to completely flip this factor to favor S.B. 824 being constitutional. That said, the fifth factor was not bifurcated in the state case's injunction hearing and therefore might favor the state now.

In sum, only one of the five factors considered in *Arlington's* discriminatory intent analysis is affected by H.B. 1169's amendments. The other four factors still support the voter ID law being unconstitutional.

CONCLUSION

Section 10 of H.B. 1169 corrects one of main points of conflict in *NAACP v. Cooper*, however courts have viewed attempts by North Carolina lawmakers to pass voter ID laws as corrupted by the discrimination in the initial unconstitutional law passed in 2013. S.B. 824 was signed into law during the lame duck session in 2018, before the GOP lost its veto-proof supermajority and was written by a majority of the same legislators as the 2013 bill. For these reasons, the amendments in H.B. 1169 are unlikely to alter the analysis of discrimination in the voter ID law. Thus, the amendment is unlikely to cure and make S.B. 824 constitutional.

It is very likely that the federal injunction will stand through the 2020 election as trial is not scheduled until January 2021 and the amendment addresses only one of the judges concerns in granting the injunction. More, if S.B. 824 were to prevail at the trial court level, there is still a strong likelihood that the Fourth Circuit would view the alterations as insufficient to make it constitutional based on the similarities to H.B. 589 contested in *McCrory*.

Applicant Details

First Name **Allyson**
 Middle Initial **V**
 Last Name **Palombo**
 Citizenship Status **U. S. Citizen**
 Email Address avpalomb@cougarnet.uh.edu
 Address

Address
Street
27 Crown Trail
City
Sugar Land
State/Territory
Texas
Zip
77498
Country
United States

Contact Phone Number **703-919-2047**

Applicant Education

BA/BS From **University of Houston-Main Campus**
 Date of BA/BS **June 2019**
 JD/LLB From **University of Houston Law Center**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=74402&yr=2009
 Date of JD/LLB **May 15, 2022**
 Class Rank **25%**
 Law Review/Journal **Yes**
 Journal(s) **Houston Journal of Health Law & Policy**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Professional Organization

Organizations **Just The Beginning Foundation**

Recommenders

Michaels, Andrew
acmichae@central.uh.edu
Heard, Whitney
wwheard@central.uh.edu
713-743-0910

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

**ALLYSON
VERONICA
PALOMBO**

—
27 Crown Trail
Sugar Land, TX 77498
703.919.2047
avpalomb@cougarnet.uh.edu

June 2021

United States Magistrate Judge Honorable Elizabeth Hanes

United States Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am writing to apply for a 2022-2024 clerkship with your chambers. I am currently entering into my 3rd year at the University of Houston Law Center.

I grew up in Virginia, living there for over 13 years and would welcome the opportunity to serve it. As an intern for Judge George C. Hanks in the United States Southern District of Texas, I wrote well-researched and concise memorandums and first drafts of orders. Additionally, I have spent over a year working as a law clerk at Jones Granger Law Firm where I have had the opportunity to work on motions, many of which have been granted. These experiences have helped me develop strong legal research and writing skills.

My resume, unofficial transcript for both my undergraduate degree and law school, and writing sample, are submitted with this application. Additionally, you will receive recommendations from the following people:

Professor Andrew Michaels
acmichae@central.uh.edu
713-743-6919

Professor Whitney Heard
wwheard@central.uh.edu
713-743-0910

Please let me know if there is anything else I can do for you. I would be honored for the opportunity to interview with you and look forward to hearing from you soon.

Respectfully,

Allyson Palombo

Candidate for Juris Doctor 2022

ALLYSON VERONICA PALOMBO

27 CROWN TRAIL
SUGAR LAND, TX 77498

AVPALOMB@COUGARNET.UH.EDU
703.919.2047

EDUCATION

May 2022 **University of Houston Law Center**, Houston, Texas

Juris Doctor Candidate

- GPA: 3.51; Dean's List Fall 2020, 2021; Top 25%
- Houston Journal of Health Law and Policy: Publications Editor
- Class Tutor, Statutory Interpretation, Spring 2021
- Legal Writing Fellow, Fall 2020 – Spring 2022
- Street Law Teacher, Alief Early College High School, Fall 2020 — Spring 2021

May 2019 **University of Houston**, Houston, Texas

Bachelor of Science in Political Science, Minor in Organizational Leadership

- GPA: 3.676, *Magna Cum Laude*
- Academic Excellence Scholarship consecutively 2016-2019
- Graduated in 3 years; Dean's Honor List consecutively 2016-2019

WORK EXPERIENCE

Summer 2021 **Chambers of the Honorable Judge Hanks in the United States Southern District of Texas**

Judicial Internship through the ABA's Judicial Intern Opportunity Program

- Drafted memos and orders on default judgments, summary judgments, and motions to dismiss
- Observed civil hearings on preliminary injunctions, discovery disputes, motions, and criminal hearings on initial appearances, pleas, and sentencing as well as trials

2020 - 2021 **Jones Granger Law Firm**

Law Clerk

- Utilized legal research and writing skills to draft memos, petitions, discovery documents, and briefs on labor and employment, contract, and personal injury cases
- Worked with attorneys to prepare for trial including consulting with clients, creating exhibits based on evidence, and drafting opening and closing arguments.
- Completed an initial and final draft of a motion for summary judgment that was granted for plaintiffs

2018-2019 **QKids**

ESL Teacher, Instructional Specialist

- Taught English to immigrant students from China, ranging in age from 2 to 12 years old
- Worked with an international company in developing learning materials for second language learners including reviewing video content, dynamic activities, and tracking student progress

Summer 2016 **Devine Consulting**

Social Media and Marketing Intern

- Created marketing materials such as flyers, advertisements, and social media content posted to online platforms
- Managed LinkedIn and Facebook Campaigns; utilized analytics to drive sales growth at an accounting firm

2015-2016 **The Tutoring Center**

Head Instructor

- Educated students from pre-K to college-level in math, science, history, and English; graded materials
- Created promotional materials for center growth and incentive programs for students' learning motivation

NOTABLES

- TEFL Certificate; Teaching English as a Foreign Language
- Interests: Yoga, Weightlifting, RPGs such as Dungeons & Dragons; Photography; Reading

Prepared June 2021

Unofficial Transcript

Name: Allyson V Palombo
Student ID: 1528892

Print Date: 06/06/2021

SSN: XXX-XX-0495
Birthdate: XXXX-06-11
Student Address: 7 Serina Lane
Missouri City, TX 77459-1150

Request Reason: Web Transcript Request
Other Institutions Attended:

Wharton County Jr College
911 E Boling Highway
Wharton, TX 77488-3298

Ridge Point High School
500 Waters Lake Blvd
Missouri City, TX 77459-3256

External Degrees

Ridge Point High School
Recommended HS diploma 06/01/2016

Beginning of Undergraduate Record

FA 2016

Program: TECH Undergraduate
Plan: Digital Media, BS Major

Course	Description	Attempted	Earned	Grade	Points
GEOL 1340	Earth Systems	3.000	3.000	B+	9.990
Course Attributes:	(30) Core-Life & Physical Sciences				
Instructor:	Jennifer N Lytwyn				
MATH 1310	College Algebra	3.000	3.000	A-	11.010
Course Attributes:	(20) Core-Mathematics				
Instructor:	Shahinda Hafeez				
POLS 1336	US and Texas Const/Politics	3.000	3.000	A-	11.010
Course Attributes:	(70) Core-Government/Political Science				
Instructor:	Richard W Murray				
POLS 1337	US Govt: Congress, Pres & Crts	3.000	3.000	A-	11.010
Course Attributes:	(70) Core-Government/Political Science				
Instructor:	Gregory Weiher				
SCLT 3381	Industrial and Consumer Sales	3.000	3.000	A-	11.010
Instructor:	Margaret A Kidd				

Transfer Credit from Wharton County Jr College

Applied Toward TECH Undergraduate

Course	Description	Attempted	Earned	Grade	Points
ENGL 1304	First Year Writing II	3.000	3.000	A	0.000
ENGL 1303	First Year Writing I	3.000	3.000	A	0.000
HIST 1378	The U S Since 1877	3.000	3.000	A	0.000
HIST 1377	The U S To 1877	3.000	3.000	A	0.000
Course Trans GPA:	0.000	0.000	12.000		0.000
Transfer Totals:					

Term GPA	3.602	Term Totals	Attempted	Earned	GPA Units	Points
			15.000	15.000	15.000	54.030
Term Honor:	Dean's List					
	Good Academic Standing					

SP 2017

Program: TECH Undergraduate
Plan: Digital Media, BS Major

Unofficial Transcript

Name: Allyson V Palombo
Student ID: 1528892

Course	Description	Attempted	Earned	Grade	Points
GEOL 1330 Course Attributes: Instructor:	Physical Geology (30) Core-Life & Physical Sciences Jennifer N Lytwyn	3.000	3.000	B-	8.010
MATH 1313 Course Attributes: Instructor:	Finite Math with Applications (20) Core-Mathematics (90) Core-Math/Reasoning, Component Area Option Shahinda Hafeez	3.000	3.000	A-	11.010
PSYC 1300 Course Attributes: Instructor:	Intro To Psychology (80) Core-Social & Behavioral Science Nicholas A Armenti	3.000	3.000	A-	11.010
TELS 3340 Instructor:	Org Leadership & Supervision Lawrence Wagoner	3.000	3.000	A	12.000
TELS 3345 Instructor:	Human Resources in Technology Lawrence Wagoner	3.000	3.000	A	12.000

Term GPA	3.602	Term Totals	Attempted 15.000	Earned 15.000	GPA Units 15.000	Points 54.030
Term Honor:	Dean's List Good Academic Standing					

SU 2017

Program: TECH Undergraduate
Plan: Digital Media, BS Major

Course	Description	Attempted	Earned	Grade	Points
DIGM 2350 Instructor:	Graphics for Digital Media Karen Yvonne Snyder	3.000	3.000	A	12.000
ITEC 3325 Instructor:	Survey of IT Applications Mark Stephen Hargrove	3.000	3.000	B+	9.990

Term GPA	3.665	Term Totals	Attempted 6.000	Earned 6.000	GPA Units 6.000	Points 21.990
	Good Academic Standing					

FA 2017

Program: TECH Undergraduate
Plan: Digital Media, BS Major

Course	Description	Attempted	Earned	Grade	Points
ARTH 1381 Course Attributes: Instructor:	Art & Soc: Renaiss to Modern (50) Core-Creative Arts Hugh R Nevitt	3.000	3.000	B-	8.010
ENGL 3327 Course Attributes: Instructor:	Masterpieces of British Lit I (40) Core-Language, Philosophy & Culture Mark A Womack	3.000	3.000	A	12.000
PHIL 1321 Course Attributes: Instructor:	Logic I (90) Core-Math/Reasoning, Component Area Option Yael R Loewenstein	3.000	3.000	B	9.000
SCLT 2380 Instructor:	Distribution Channels Keziah Cyline Khan-Hill	3.000	3.000	A	12.000
TELS 3363 Course Attributes: Instructor:	Technical Communications (81) Core-Writing in Discipline WID Andrew Kozma	3.000	3.000	A	12.000

Term GPA	3.534	Term Totals	Attempted 15.000	Earned 15.000	GPA Units 15.000	Points 53.010
Term Honor:	Dean's List Good Academic Standing					

Unofficial Transcript

Name: Allyson V Palombo
Student ID: 1528892

SP 2018

Program: TECH Undergraduate
Plan: Digital Media, BS Major

Course		Description	Attempted	Earned	Grade	Points
DIGM	2351	Web Design	3.000	3.000	A-	11.010
Instructor:		Mark Stephen Hargrove				
DIGM	2352	Digital Photography	3.000	3.000	A	12.000
Instructor:		Patrice E Charleville				
TELS	3355	Project Leadership	3.000	3.000	A	12.000
Instructor:		Louis Durand Evans				
TELS	4342	Quality Improvement Methods	3.000	3.000	A-	11.010
Instructor:		Michael Dean Chance				
TMTH	3360	Applied Technical Statistics	3.000	3.000	A-	11.010
Course Attributes:		(90) Core-Math/Reasoning, Component Area Option				
Instructor:		Lindsay Buckingham				

Term GPA	3.802	Term Totals	Attempted 15.000	Earned 15.000	GPA Units 15.000	Points 57.030
Term Honor:	Dean's List					
	Good Academic Standing					

SU 2018

Program: TECH Undergraduate
Plan: Digital Media, BS Major

Course		Description	Attempted	Earned	Grade	Points
PSYC	2351	Psychology of Adolescence	3.000	3.000	A	12.000
Course Attributes:		(80) Core-Social & Behavioral Science				
Instructor:		Lee A Wiegand				
PSYC	3325	Psychology of Personality	3.000	3.000	A	12.000
Instructor:		William H Lacey				

Term GPA	4.000	Term Totals	Attempted 6.000	Earned 6.000	GPA Units 6.000	Points 24.000
	Good Academic Standing					

FA 2018

Program: TECH Undergraduate
Plan: Digital Media, BS Major

Course		Description	Attempted	Earned	Grade	Points
PHYS	1305	Intro Astronomy-Sol Sys	3.000	3.000	B+	9.990
Course Attributes:		(30) Core-Life & Physical Sciences				
Instructor:		Liming Li				
POLS	3310	Intro to Political Theory	3.000	3.000	A	12.000
Course Attributes:		(81) Core-Writing in Discipline WID				
Instructor:		Ndifreke Mfon Ette				
POLS	3311	Intro Compar Politics	3.000	3.000	B+	9.990
Course Attributes:		(80) Core-Social & Behavioral Science				
Instructor:		Ronald V Vardy				
POLS	3312	Arguments, Data, Politics	3.000	3.000	B	9.000
Course Attributes:		(90) Core-Math/Reasoning, Component Area Option				
Instructor:		Scott Clifford				
POLS	3354	Law and Society	3.000	3.000	A-	11.010
Course Attributes:		(80) Core-Social & Behavioral Science				
Instructor:		Lydia B Tiede				
POLS	3381	Political Psychology	3.000	3.000	A-	11.010
Instructor:		Scott Clifford				

Unofficial Transcript

Name: Allyson V Palombo
Student ID: 1528892

Term GPA	3.500	Term Totals	<u>Attempted</u> 18.000	<u>Earned</u> 18.000	<u>GPA Units</u> 18.000	<u>Points</u> 63.000
Term Honor:	Dean's List Good Academic Standing					

SP 2019

Program: LASS Undergraduate
Plan: Political Science, BS Major
Plan: Minor in Organizational Leadership and Supervision Minor

Course		Description	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
POLS	3309	Democratization	3.000	3.000	B+	9.990
Instructor:		Ryan P Kennedy				
POLS	3318	Intro To Public Policy	3.000	3.000	A	12.000
Instructor:		Elena Farah				
POLS	3331	American Foreign Policy	3.000	3.000	A-	11.010
Instructor:		Ronald V Vardy				
POLS	3346	Human Rights	3.000	3.000	A	12.000
Instructor:		Lydia B Tiede				
POLS	3351	Law in Literature and Film	3.000	3.000	A	12.000
Instructor:		Lydia B Tiede				
SOC	1300	Introduction To Sociology	3.000	3.000	A	12.000
Course Attributes:		(80) Core-Social & Behavioral Science				
Instructor:		Jennifer Lauren Graves				
WGSS	3321	Gender in Transnational Persp	3.000	3.000	A	12.000
Instructor:		Dina Al-Sowayel				

Term GPA	3.857	Term Totals	<u>Attempted</u> 21.000	<u>Earned</u> 21.000	<u>GPA Units</u> 21.000	<u>Points</u> 81.000
Term Honor:	Dean's List Good Academic Standing					

Degrees Awarded

Degree: Bachelor of Science
Confer Date: 05/09/2019
Degree GPA: 3.676
Degree Honors: Magna Cum Laude
Plan: Political Science, BS
Plan: Minor in Organizational Leadership and Supervision

Undergraduate Career Totals						
Cum GPA:	3.676	Cum Totals	111.000	111.000	111.000	408.090

Milestones

TSI MATH
Status: Completed
Date Completed: 10/01/2015

TSI READING
Status: Completed
Date Completed: 10/01/2015

TSI WRITE
Status: Completed
Date Completed: 10/01/2015

Texas State Mandated Core
Status: Completed

Name: Allyson V Palombo
Student ID: 1528892

Unofficial Transcript

End of Unofficial Transcript

Unofficial Transcript

Name: Allyson V Palombo
Student ID: 1528892

Print Date: 06/06/2021

SSN: XXX-XX-0495
Birthdate: XXXX-06-11
Student Address: 7 Serina Lane
Missouri City, TX 77459-1150

Request Reason: Web Transcript Request

Other Institutions Attended:

Wharton County Jr College
911 E Boling Highway
Wharton, TX 77488-3298

Ridge Point High School
500 Waters Lake Blvd
Missouri City, TX 77459-3256

External Degrees

Ridge Point High School
Recommended HS diploma 06/01/2016

Beginning of Law Record

FA 2019

Program:	Law Professional					
Plan:	Law, JD Major					
<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW 5314		Lawyering Skills & Strategy I	3.000	3.000	A-	11.010
Instructor:		Derrick Earl Gabriel Whitney W Heard				
LAW 5406		Civil Procedure	4.000	4.000	A	16.000
Instructor:		Derrick Earl Gabriel David L Crump				
LAW 5409		Contracts	4.000	4.000	B-	10.680
Instructor:		Derrick Earl Gabriel Darren Bush				
LAW 5418		Torts	4.000	4.000	B+	13.320
Instructor:		Derrick Earl Gabriel Meredith J Duncan				
Term GPA	3.401	Term Totals	<u>Attempted</u> 15.000	<u>Earned</u> 15.000	<u>GPA Units</u> 15.000	<u>Points</u> 51.010
Term Honor:	Dean's List					

SP 2020

Program: Law Professional
Plan: Law, JD Major

Unofficial Transcript

Name: Allyson V Palombo
Student ID: 1528892

Course		Description	Attempted	Earned	Grade	Points
LAW	5303	Criminal Law	3.000	3.000	S	0.000
Instructor:		Derrick Earl Gabriel David Y Kwok				
LAW	5378	Statutory Interpretation & Rea	3.000	3.000	S	0.000
Instructor:		Derrick Earl Gabriel Andrew Charles Michaels				
LAW	5408	Property	4.000	4.000	S	0.000
Instructor:		Derrick Earl Gabriel Ryan Hudson				
LAW	5488	Constitutional Law	4.000	4.000	S	0.000
Instructor:		Derrick Earl Gabriel Emily Berman				
LAW	6207	Lawyering Skills & Strategy II	2.000	2.000	S	0.000
Instructor:		Derrick Earl Gabriel Whitney W Heard				
Term GPA	0.000	Term Totals	Attempted 16.000	Earned 16.000	GPA Units 0.000	Points 0.000

FA 2020

Program: Law Professional
Plan: Law, JD Major

Course		Description	Attempted	Earned	Grade	Points
LAW	5199	Special Problems	1.000	1.000	S	0.000
Course Topic:		Special Problems - Aep				
Instructor:		Derrick Earl Gabriel Greg R Vetter				
LAW	5325	National Security Law	3.000	3.000	B+	9.990
Instructor:		Derrick Earl Gabriel Emily Berman				
LAW	5343	Employment Law	3.000	3.000	B	9.000
Instructor:		Derrick Earl Gabriel Kenneth Richard Swift				
LAW	5357	Evidence	3.000	3.000	A-	11.010
Instructor:		Paul Janicke Derrick Earl Gabriel				
LAW	5403	Street Law	4.000	4.000	A-	14.680
Instructor:		Ellen Marrus Derrick Earl Gabriel Gavriella Roisman				
Term GPA	3.437	Term Totals	Attempted 14.000	Earned 14.000	GPA Units 13.000	Points 44.680
Term Honor:	Dean's List					

SP 2021

Program: Law Professional
Plan: Law, JD Major

Unofficial Transcript

Name: Allyson V Palombo
Student ID: 1528892

Course		Description	Attempted	Earned	Grade	Points
LAW	5199	Special Problems	1.000	1.000	S	0.000
Course Topic:		Special Problems - Aep				
Instructor:		Derrick Earl Gabriel Greg R Vetter				
LAW	5199	Special Problems	1.000	1.000	S	0.000
Course Topic:		Special Problems - Aep				
Instructor:		Derrick Earl Gabriel Greg R Vetter				
LAW	5382	Administrative Law	3.000	3.000	A-	11.010
Instructor:		Derrick Earl Gabriel Brandon W Duke				
LAW	5497	Selected Topics	4.000	4.000	A-	14.680
Course Topic:		Street Law II				
Instructor:		Ellen Marrus Derrick Earl Gabriel Gavriella Roisman				
LAW	6321	Professional Responsibility	3.000	3.000	A	12.000
Instructor:		Derrick Earl Gabriel Meredith J Duncan				
Term GPA	3.769	Term Totals	Attempted 12.000	Earned 12.000	GPA Units 10.000	Points 37.690

SU 2021

Program:		Law Professional				
Plan:		Law, JD Major				
<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	5328	Judicial Externship I	3.000	0.000	In Progress	0.000
Instructor:		Derrick Earl Gabriel				
		William Powers				
		Kristina G Van Arsdel				
		Carey Ann Worrell				
		Anna M Archer				
LAW	6358	Health Law Journal	3.000	0.000	In Progress	0.000
Instructor:		Seth J Chandler				
		Derrick Earl Gabriel				
Term GPA	0.000	Term Totals	<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
			6.000	0.000	0.000	0.000

FA 2021

Program:		Law Professional				
Plan:		Law, JD Major				
<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	5344	Appellate Advocacy I	3.000	0.000	In Progress	0.000
Instructor:		Derrick Earl Gabriel Robert M Roach Julia Marie Peebles				
LAW	5351	Juvenile Law	3.000	0.000	In Progress	0.000
Instructor:		Ellen Marrus Derrick Earl Gabriel				
LAW	6209	Health Law Journal	2.000	0.000	In Progress	0.000
Instructor:		Seth J Chandler Derrick Earl Gabriel				
LAW	6302	Foreign Relations Law	3.000	0.000	In Progress	0.000
Instructor:		Derrick Earl Gabriel Emily Berman				
LAW	7324	WRC: Advanced Legal Writing	3.000	0.000	In Progress	0.000
Instructor:		Derrick Earl Gabriel Jani Maselli				

Name: Allyson V Palombo
Student ID: 1528892

Unofficial Transcript

Term GPA	0.000	Term Totals	<u>Attempted</u> 14.000	<u>Earned</u> 0.000	<u>GPA Units</u> 0.000	<u>Points</u> 0.000
Law Career Totals						
Cum GPA:	3.510	Cum Totals	77.000	57.000	38.000	133.380

End of Unofficial Transcript

June 2021

Dear Judge,

I write to provide my highest recommendation regarding Allyson Palombo, who served as a teaching assistant for my Statutory Regulation and Interpretation class as a 2L, and also was a student of mine in that same class as a 1L. Allyson distinguished herself in both roles. As a student, she provided insightful questions and comments, enhancing the class discussion, and her final exam performance was also outstanding. This earned her the teaching assistant role for the following year, wherein she was extremely helpful, holding office hours to answer student questions, and taking the lead in organizing and holding three review sessions throughout the semester. Her general responsiveness, timeliness, and tone, was also exceptionally refined for a student teaching assistant.

There is no doubt that Allyson will bring this same diligence, good judgment, and skill to her work in the future, and I am confident that she would make an excellent law clerk. Please do not hesitate to contact me with any questions.

Best Regards,

Andrew C. Michaels
Assistant Professor of Law
University of Houston Law Center
4604 Calhoun Road, Houston, TX, 77204
314-323-2201
acmichaels@uh.edu

June 22, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

My name is Whitney Werich Heard, and I am a Clinical Associate Professor at the University of Houston Law Center (UHLC). I am writing this letter on behalf of Allyson Palombo who would like the opportunity to serve as a judicial clerk in your chambers. I taught Ms. Palombo as a first-year law student during the 2019-2020 term when she was assigned to my Lawyering Skills and Strategies (LSS) class. Ms. Palombo also works as a Fellow in the Legal Writing Center that I direct. In both capacities, Ms. Palombo has proven herself to be a promising legal writer and student leader, and I am confident that she will make an outstanding judicial clerk.

Academically, Ms. Palombo has distinguished herself at UHLC. With an impressive 3.51 GPA, Ms. Palombo is in the top 25% of her class. And, as a student in my LSS class, she received a top grade in recognition of her focused research, rigorous analysis, and precise writing. Accordingly, I was thrilled when Ms. Palombo applied to serve as a Fellow and accepted the position. As the faculty director for the Legal Writing Center at UHLC, I am responsible for interviewing and selecting students to serve as Fellows. I seek students with exceptional legal research, analysis, and writing skills who will succeed at teaching those skills to others. Based on my experiences with Ms. Palombo in LSS, I knew that her strong writing skills were matched by robust interpersonal and leadership skills.

As a Fellow, Ms. Palombo offers individual tutoring sessions during weekly office hours and scheduled appointments. These sessions demand an empathetic and patient listener who can quickly diagnose a struggling student's problems and offer targeted assistance. Ms. Palombo honed these skills as a head instructor at The Tutoring Center and as an ESL Teacher at QKids. Her TEFL (Teaching English as a Foreign Language) certificate has been a particularly valuable asset when assisting students enrolled in the Foreign LL.M. program. In fact, Ms. Palombo has flourished in this role with multiple students returning to her for extra support.

Additionally, Ms. Palombo has collaborated with other Fellows to organize and lead workshops on essential lawyering skills. During the fall semester, she prepared and led a workshop focused on important study skills including how to brief cases and create outlines. For the spring semester, she helped organize and present a workshop on how to approach research and writing assignments as a summer legal intern. In advance of each workshop, Ms. Palombo attended multiple meetings with her team to brainstorm ideas and select content. Thanks to her contributions, the workshop presentations successfully educated and fully engaged audience members.

As a Fellow, Ms. Palombo went above and beyond the traditional requirements. During the fall semester, she embarked upon a special project in consultation with the Career Development Office (CDO). Specifically, she created a handout to guide first-year students through the process of converting a legal memorandum into a writing sample. The LSS professors were grateful to Ms. Palombo for designing such an informative and user-friendly handout, and they eagerly distributed the handout to first-year students in need of such guidance. During the spring semester, Ms. Palombo jumped at the chance to work with the CDO again. She arranged for several CDO directors to participate in the spring workshop as special guests who could answer questions about summer legal internships.

Each of Ms. Palombo's achievements as a Fellow is even more impressive and valuable given the fact that we had to convert the Legal Writing Center into an entirely virtual operation this year. The pandemic, unfortunately, shut down our physical space. So, every appointment, workshop, and project was organized and offered virtually. It's a true testament to Ms. Palombo's flexibility, resourcefulness, and resilience that she was able to excel in this demanding virtual environment. I am very excited that Ms. Palombo will be returning to the Legal Writing Center next year. The new cohort of Fellows will benefit from her knowledge and experience as well as her support and encouragement.

Incredibly, Ms. Palombo balances her service as a Fellow with her active participation in other enriching activities at UHLC. For example, Ms. Palombo taught and mentored students at Alief Early College High School through the Street Law program while also serving as a class tutor for Statutory Interpretation. And she contributes her writing and editorial talent to the *Houston Journal*

Whitney Heard - wwheard@central.uh.edu - 713-743-0910

of Health Law and Policy as a publications editor. Ms. Palombo's ability to perform admirably as a Fellow, Street Law teacher, class tutor, and publications editor speaks volumes about her organizational acuity. Her expertise at managing time, prioritizing tasks, and meeting deadlines is truly remarkable.

On a more personal level, I have enjoyed getting to know Ms. Palombo. Her warmth and thoughtfulness are complemented by an effortless optimism that makes working with her an absolute joy. I appreciate her commitment to serving and leading members of the UHLC community. Teaching and mentoring Ms. Palombo has been a profoundly uplifting experience. And, I am certain that she will thrive as a judicial clerk in the same way that she has thrived as a law student. Therefore, I offer my wholehearted recommendation of Ms. Palombo. If I can be of any further assistance to you, please do not hesitate to contact me by telephone at 713-743-0910 or by email at wwheard@central.uh.edu.

Warm regards,

Whitney Werich Heard

Whitney Werich Heard
Clinical Associate Professor
Lawyering Skills and Strategies

Whitney Heard - wwheard@central.uh.edu - 713-743-0910

Allyson Palombo
Legal Writing Sample
Summer 2021

The following writing sample is a Post-Hearing Brief I completed while working for Jones Granger Law Firm that was submitted to an Administrative Law Judge. In this case, we argued that our client was wrongfully retaliated against by a railroad company for reporting an on the job injury, and as such, this claim was under the FRSA. I was not assisted on the writing or editing of this assignment, and I was given permission by the firm to use this document as my legal writing sample.

Some arguments and exhibits were removed from this sample for length purposes including all factual cites to the record, arguments refuting the Railroad Company's affirmative defense, and discussions of compensatory and punitive damages. The names of both parties were changed for Rule 1.6 confidentiality.

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

JOHN DOE	§	
	§	
Complainant,	§	
	§	
VS.	§	XXXX-FRS-XXX
	§	
RAILROAD COMPANY	§	
	§	
Respondent.	§	

COMPLAINANT’S POST-HEARING BRIEF

The Complainant, by and through his attorney, hereby submits his Post-Hearing Brief in this case and would respectfully show the Judge the following in support thereof:

I. OVERVIEW

John Doe was a longtime and loyal employee of Railroad Company when he was badly injured working as a conductor on the RT46 Pull Board in Denison, Texas. Instead of taking action to assist Mr. Doe, Railroad Company crafted a disciplinary investigation alleging Mr. Doe was dishonest and immoral after the date of the injury – August 30, 2018. Railroad Company began the disciplinary investigation due to alleged claims that Mr. Doe took actions to exacerbate the nature and severity of a previously reported on-duty injury. Though Railroad Company argues that the company would have started the disciplinary investigation regardless of whether Mr. Doe engaged in the protected activity, this is impossible, and all the record evidence shows the opposite. Mr. Doe reported a work-related injury, a protected activity, and Railroad Company retaliated by starting a disciplinary investigation that would have resulted in termination.

Railroad Company did exactly what the Federal Rail Safety Act, 49 U.S.C. § 20109 (FRSA) is designed to prevent: disciplined an employee for reporting an injury. Therefore, the Judge should rule in favor of Mr. Doe and deny Railroad Company's arguments altogether. Mr. Doe engaged in a protected activity by reporting an on the job injury and that protected activity was a contributing factor to the adverse actions Mr. Doe suffered.

II. STANDARD AND BURDEN OF PROOF

Section 20109 of the FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, in whole or part, for engagement in activity protected by the FRSA. The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. §42141. See § 20109(d)(2)(A)(i). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof outlined in AIR 21. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

The burden-shifting framework outlined in AIR 21 requires a complainant to prove that: "(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 5 (ARB Feb. 29, 2012) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Cont'l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR00009, slip op. at 6-7 (ARB Jan. 31, 2012)); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-00012, PDF at 5-6 (ARB Oct. 26, 2012).

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it “demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” 49 U.S.C. §§4214(b)(2)(B)(iv), 20109(d)(2)(A)(i); see also 29 C.F.R. § 1982.104. “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF at 5 (ARB Jan. 31, 2011)(quoting *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006)).

III. STATEMENT OF FACTS

Prior to the accident, Mr. Doe had no serious issues or investigations on his record only 7 attendance notes over the course of 14 years. On August 30, 2018, Mr. Doe was working as a conductor in Denison, Texas where he sustained a very serious injury to his right arm and elbow which required several surgeries. On August 31, 2018, Mr. Doe filed a report of personal injury, which is a protected activity under 49 C.F.R § 20109. In this case, the protected activity element has been agreed upon by Respondent.

Mr. Doe initially went to visit an ER doctor on September 2, 2018, and he went for a follow-up visit with Dr. Mark Young two days later. He was required to stay out of work for several months and needed three surgeries due to the on-the-job injury he suffered. On December 13, 2018, Mr. Doe began physical therapy with a PT which continued for 29 weekly visits. Mr. Doe continued to have monthly checkups with Dr. Young regarding the progress he made in physical therapy and follow-ups for his various surgeries.

On March 9, 2019, Crystal Bowen called Railroad Company's Risk Management Communication Center ("RMCC") and alleged that Mr. Doe had asked her and Ms. Hamilton to strike his injured elbow with a sledgehammer. On March 11, 2019, Railroad Company employee, Special Agent Mayton assigned Mr. Bybee to investigate the claim criminally, and Mr. Bybee began the criminal investigation. Mr. Bybee knew about Mr. Doe's reported on the job injury after speaking with Pauline Weatherford who deals with medical paperwork.

On March 12, 2019, Mr. Bybee contacted Crystal Bowen and Codi Hamilton to obtain recorded statements. On March 13, 2019, Mr. Bybee received in-person statements from Codi Hamilton who allegedly hit Mr. Doris's arm with a sledgehammer and Crystal Bowen who allegedly witnessed Mr. Doe promise Codi money for hitting him. Mr. Bybee never contacted Mr. Doe, Mr. Doe's daughter, or anyone else who may have had relevant information on the case based on the instruction of Railroad Company. Mr. Bybee never even contacted Mr. Doe's doctors or his physical therapists to discover whether the injury had worsened as the allegations claimed.

Special Agent Mayton told Mr. Bybee not to contact Mr. Buttral – Mr. Doe's alleged best friend who was referenced throughout the alleged incident and could have given corroborating evidence – or Mr. Doe. Mr. Bybee never took any witness statements other than Codi Hamilton and Crystal Bowen in the course of his criminal investigation. Mr. Bybee stated that in conducting a criminal investigation, an effort should be made to interview all witnesses and all the evidence should be reviewed. Mr. Bybee was not even aware that Mr. Doe had several different surgeries on his arm and was undergoing physical therapy at the time these allegations against him were made.

Between March 11th and 13th, 2019, Mr. Bybee told people at Railroad Company he was investigating Mr. Doe for employee misconduct. However, Mr. Bybee closed the case due to insufficient evidence on April 26, 2019. Mr. Bybee called the Sherman Police Department to refer the case to them, and the Sherman Police Department was not interested in pursuing the case further due to the lack of evidence. Railroad Company knew the case was closed by Mr. Bybee, their employee, due to lack of evidence.

On May 7, 2019, Mr. Bailey – Director of Road Operations – sent out a notice of the company’s disciplinary investigation to Mr. Doe, and this is the date of the adverse action in retaliation for the protected activity by acting to intimidate and threaten discipline against Mr. Doe which would have resulted in his termination. The charge stated, “On May 1, 2019, at the location of Denison, Texas, Alpha 661 Choctaw Subdivision at approximately 1600 Hours while employed as a brakeman, you allegedly were dishonest and immoral on August 30, 2018, and you took actions to exacerbate the nature and severity of previously reported all undue injury.” Mr. Bybee claims he received Mr. Bailey’s email notice to be a witness in the company’s disciplinary investigation on May 15, 2019. This is the date the disciplinary investigation was originally set for. The disciplinary investigation was originally postponed for June 19, 2019, but it was again canceled and postponed to August 7, 2019. The entire time of the pending disciplinary investigation, Mr. Doe was not able to return to work even though Railroad Company kept postponing it longer and longer.

On July 24, 2019, Codi Hamilton called RMCC to retract her accusations, but email notification never went out from RMCC “due to an error” according to the voicemail message and RMCC Supervisor – Brittney Queck. On August 7, 2019, the parties and witnesses arrived to

begin the disciplinary investigation even though Railroad Company knew the girls had recanted their statements. However the disciplinary investigation was only cancelled because the girls came to the hearing to recant their statements again, not at Railroad Company's request but on their own volition.

On the day set for the disciplinary investigation, only Mr. Bybee was brought as a witness by Railroad Company, none of Mr. Doe's doctors, physical therapists, family members, or friends who would have been aware of his physical condition changes were invited by Railroad Company.

IV.

DISCUSSION

The purpose of the Federal Rail Safety Act ("FRSA") is "to promote safety in every area of railroad operations." 49 U.S.C. §20101. The FRSA was amended in 2007 to include anti-retaliation measures and to give the Department of Labor enforcement power. After the amendment, a railroad carrier "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, *in whole or in part*" to the employee's engagement in one of numerous protected activities. 49 U.S.C. §20109(a). The basic elements of an FRSA retaliation claim are that a railroad employee such as Mr. Doe must prove by a preponderance of the evidence:

- (1) [he or] she engaged in a protected activity
- (2) the employer knew that [he or] she engaged in the protected activity
- (3) [he or] she suffered an unfavorable personnel action; and
- (4) the protected activity was a contributing factor in the unfavorable action.

Feldman v. Law Enf't Assocs. Corp., 752 F.3d 339, 344 (4th Cir. 2014)(quoting *Allen v. Admin Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008). Then, the burden shifts to the employer to demonstrate “by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” 49 U.S.C. §42121(b)(2) (B). In this case, the protected activity element has been agreed upon. Thus, Mr. Doe engaged in a protected activity by filing an injury report, and Railroad Company was aware of this fact and even discouraged Mr. Doe from the filing of this report.

A. Mr. Doe Can Establish Railroad Company Knowingly Took Adverse Action by Initiating a Disciplinary Investigation into Mr. Doe’s Potential Dishonesty.

Complainants are only required to prove the protected activity was a contributing factor not that there was discriminatory intent. *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1194 (9th Cir. 2019). In *Frost v. BNSF*, BNSF argued that the FRSA is a discrimination statute and that plaintiffs must affirmatively prove that their employers acted with discriminatory intent in order to bring claims for unlawful retaliation. *Id.* However, the Court of Appeals found that BNSF missed that the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a “contributing factor” in the resulting adverse employment action, not the sole discriminatory intent or purpose. *Id.*

In *Kudak v. BNSF Ry. Co.*, the 8th Circuit stated “the FRSA knowledge requirement may be satisfied by circumstantial evidence the employer had actual or constructive knowledge of protected activity... under the statute’s ‘contributing factor’ causation standard, ‘[a] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive.’ ... But the contributing factor that an employee must prove is intentional retaliation

prompted by the employee engaging in protected activity,” 768 F.3d 786, 790-91 (8th Cir. 2014).

The use of the phrase intentional retaliation is a way of saying the managers who took the adverse action must have had some knowledge of the employee’s protected activity, not something more than that.

The Administrative Review Board further illustrates that the phrase intentional retaliation is meaningless. In *Riley v. Dakota, Minnesota & Eastern Railroad*, the ARB spells out why intentional retaliation does not apply to the FRSA’s contributing factor standard: Kudak holds that “the contributory factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity” but this pronouncement is both conclusory and contrary to the weight of the contributory factor element required by the statute, ARB No. 16-010, 16-052, ALJ No. 2014-FRS-044, slip op. at 6 (ARB Jul. 6, 2018). In footnote 13, the ARB cites decisions from the 3rd, 5th, 7th, and Federal Circuit Courts contradicting Kudak and explaining how Kudak erroneously substituted Title VII’s motivating factor standard for what is required under the FRSA which is simply a “contributing factor standard.” *Id.* The 8th circuit itself admits in Kudak that the FRSA does not require the employee to “demonstrate the employer’s retaliatory motive,” *Kudak v. BNSF Ry. Co.*, 768 F.3d at 791. Therefore, the phrase – intentional retaliation – simply refers to the fact that one or more of the managers involved in the adverse action must have had some knowledge of the employee’s protected activity. However, proving mere awareness as is required is far different from proving a person’s internal motive or intent. Under the FRSA, the employee does not have to prove a manager’s internal motive or intent, only that the manager had some actual or constructive notice of the protected activity before initiating the adverse action. *Riley v. Dakota, Minnesota & Eastern Railroad*, slip op. at 6.

In Mr. Doe's case, the supervisors initiating the adverse action or the disciplinary investigation namely Mr. Bailey knew about the protected activity because the disciplinary investigation involved alleged dishonesty regarding the protected activity. Mr. Bailey states he was aware that Mr. Doe was injured at a switch due to his role as Director of Road Operations. The protected activity and the disciplinary investigation are inextricably intertwined because if the injury had not occurred Railroad Company would not have had grounds for starting the disciplinary investigation because they concern the same subject, so it is insensible to suggest that Mr. Bailey did not know about Mr. Doe's injury because to head the disciplinary investigation he would be required to know that Mr. Doe had been injured on the job to allegedly worsen that on-the-job injury. If Mr. Doe had not been injured on the job while working for Railroad Company, then Mr. Bailey who issued the notice for the disciplinary investigation would not have had grounds to start the disciplinary investigation because it was revolving around the alleged dishonesty surrounding the injury. Therefore, Mr. Bailey and the other supervisors at Railroad Company investigating Mr. Doe could not have headed the disciplinary investigation without knowing about the protected activity of the on-the-job injury.

B. Railroad Company Took Adverse Action Against Mr. Doe.

The FRSA specifically prohibits an employer from taking adverse actions against employees who report injuries, including discharge, demotion, suspension, reprimand, or "any other discriminatory action." 49 U.S.C. §20109(a). The regulations provide that employers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee" for engaging in a protected activity. 49 CFR §1982.102(b)(1). In *Williams v.*

American Airlines, ARB No. 09-018, ALJ No. 2007-AIR-00004 slip op. at 6 (ARB Dec. 29, 2010), the Board held that the prohibited activities list should be used broadly to include reprimands (written or verbal) and counseling sessions with reference to potential discipline. “In fact, given this regulation, we believe that a written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline. *Id.* The Board also clarified that the term ‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged, and claims brought under whistleblower statutes, an adverse action is any action that “would dissuade a reasonable employee from engaging in protected activity.” *Id.* at 5.

In *Vernace v. Port Authority Trans-Hudson Corp.*, Ms. Vernace was an employee who was injured while sitting on a defective chair, ALJ No. 2010-FRS-00018 slip op. at 23 (ALJ Sep. 23, 2011). Ms. Vernace filed an injury report and was subsequently reprimanded with a safety violation for not properly inspecting the chair. *Id.* at 26. The Administrative Law Judge ruled that **“the filing of charges against Complainant which carried the potential for future discipline was an unfavorable personnel action.”** *Id.* at 27. (emphasis added). The Administrative Law Review Board affirmed the judges’ opinion adding that “Congress re-emphasized the broad reach of FRSA when it expressly added ‘threatening discipline’ as prohibited discrimination in section 20109(c) of the FRSA whistleblower statute.” *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018 slip op. at 2-3 (ALJ Dec. 21, 2012).

Mr. Doe was injured on the job while working for Railroad Company, so he did what he

thought was right by filing a personal injury report with Railroad Company. However, shortly after, Railroad Company began a criminal investigation to determine whether Mr. Doe was doing anything to worsen the extent of his injuries or lie in any way. Railroad Company began a criminal investigation under Mr. Bybee at first where they refused to allow Mr. Bybee to contact Mr. Doe, Mr. Buttral – who according to Mrs. Bowen allegedly could corroborate the story – or any of his medical providers to see if the injury had worsened. Following that, Railroad Company learnt that Mr. Bybee stated there was no evidence to support the allegations that Mr. Doe was worsening his injury, but instead of dropping the claim, the company notified Mr. Doe they would be starting a disciplinary investigation based on the unfounded and incredulous allegations of Ms. Hamilton and Ms. Bowen. Mr. Doe was retaliated against the day he received and knew about the 1.6 charge that Railroad Company presented against him even after the criminal investigation fell short and could not corroborate any evidence that the girls' statements were truthful. The day Mr. Doe received the charge letter was the day the retaliation occurred. The disciplinary investigation done by Railroad Company would have led to unfavorable personnel action, Mr. Doe's termination by the company which would have been devastating to Mr. Doe. The disciplinary investigation notice was an attempt to threaten and intimidate Mr. Doe to drop his FELA lawsuit, which is not allowed under the FRSA. Furthermore, if the girls had not recanted their statements on the day of the disciplinary investigation, Railroad Company would have terminated Mr. Doe even though they knew the allegations were false weeks earlier. Dishonesty and immoral conduct is one of the most serious Railroad Company charges, and it is viewed as a termination of employment. According to Mr. Zirklebach who has attended over 300 investigations where 40 of those investigations were related to a charge of dishonesty and

immoral conduct, roughly 85% of those resulted in termination. Mr. Zirklebach believed that in this case, Mr. Doe would have been terminated. This potential termination against Mr. Doe was for allegations that could not have existed if Mr. Doe had not engaged in a protected activity.

Railroad Company made no attempts to hold a genuine investigation to determine the truth of the allegations, the company simply wanted to come to a result against Mr. Doe. Railroad Company did not even bring the proper witnesses such as Mr. Doe's doctors to the disciplinary hearing in August. Railroad Company was going to allow the investigation to proceed when Mr. Bybee – who did not even believe Mr. Doe had attempted to worsen his injury – was the only Railroad Company witness. Railroad Company had no intention of bringing either one of the two accusers or any other witnesses to bring all the facts on the table as they were claiming to do because they knew the girls had recanted their statements weeks earlier although the phone call recording was conveniently lost. Railroad Company alleges that the goal of the disciplinary hearing was to get all the facts on the table not to terminate Mr. Doe, but if this was the case, why did Railroad Company not bring Mr. Doe's doctors and physical therapists as witnesses themselves? In fact, Railroad Company was aware of all of these potential witnesses after Mr. Zirklebach told Mr. Bailey that the statements from Mr. Doe's doctors and Mr. Buttral contradicted the girls' statements; however, Mr. Bailey said this was not enough to cancel the investigation. Mr. Bailey could have dropped the investigation, but he choose not to, and he choose not to bring all of the witnesses to get the facts on the table. Railroad Company should not be permitted to discipline, terminate, and keep employees out of work for months found upon allegations from an investigation that was pretextual in nature.

C. Mr. Doe Can Establish His Injury Was A Contributing Factor to the Adverse Action.

A contributory factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017). The law requires complainants to prove that protected activity was a contributing factor in the unfavorable personnel action by a preponderance of the evidence. A “preponderance of the evidence” means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. §1201.56(c)(2). It further concludes that there are no limitations on the evidence that the fact finder may consider in making that determination. Types of evidence an employee can use to prove contributory factor element include direct evidence that “conclusively links the protected activity and the adverse action and does not rely on inference,” *Williams v. Domino’s Pizza*, ARE No. 09-092, slip op. at 6 (ARB Jan. 31, 2011), and circumstantial evidence that shows that the railroad’s “proffered reason was not the true reason but instead a pretext,” *Riess v. Nucor Corp.*, ARB No. 08-137, 2008-STA_OI, 1, slip op. at 6 (ARB Nov. 30, 2010). Some types of circumstantial evidence include: (1) close proximity in time between the protected activity and the unfavorable personnel action (2) disparate treatment of the whistleblower employee (3) deviation from routing procedures (4) attitude of supervisors towards the whistleblower or the protected activity in general, and (5) the employee’s work performance rating before and after engaging in the protected activity. *Griebel v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-11, slip-op at 25 (ALJ Jan. 31, 2013). And under the FRSA, an employee can prevail even without showing the railroad’s reason was a pretext that is, an employee “can alternatively prevail by showing that the railroad’s reason, while true, is only one of the reasons for its conduct and that another reason was the employee’s protected activity.” *Id.*

Bybee was instructed to perform a cursory criminal investigation devoid of any proper police investigatory techniques. The only conclusion one can come to is that the fix was in, and Railroad Company was not after the truth. The initial criminal investigation done by Mr. Bybee and the disciplinary investigation scheduled by Mr. Bailey to be brought against Mr. Doe were limited and pretextual. On March 11, 2019, Special Agent Mayton assigned Scott Bybee to investigate the claim criminally, and Mr. Bybee began his criminal investigation. Mr. Bybee interviewed the two girls who made allegations against Mr. Doe claiming he was dishonest, and Mr. Bybee concluded there was not enough corroborating evidence for the case to be continued. Railroad Company employee, Special Agent Mayton, even informed Mr. Bybee not to contact Mr. Doe during his criminal investigation or Mr. Doe's alleged best-friend, Mr. Buttral who allegedly hit Mr. Doe as well to see if the story could be corroborated.

There were zero attempts made to corroborate this incredible and laughable accusation. If Mr. Bybee had contacted Mr. Doe or his doctors, he would have been able to see that Mr. Doe was regularly seeing a doctor and a physical therapist during this period where Codi Hamilton allegedly hit his arm with a sledgehammer. If Ms. Hamilton had further injured Mr. Doe's arm, it would have been noticed by his doctor or physical therapist that all of a sudden Mr. Doe was looking worse again. However, Mr. Bybee was instructed not to do a thorough and professional criminal investigation, the kind he was trained to do. This is because the criminal investigation was pretextual, based on a lie, and Mr. Bybee knew it, even apologizing during his testimony at trial. "I did not look at them, sorry." Mr. Bybee did not look at the medical records or speak to any of Mr. Doe's doctors because Special Agent Mayton told him not to because Railroad Company did not want to know the truth of the matter; Railroad Company wanted to condemn

Mr. Doe regardless of whether he committed a dishonest act because he had reported an injury months earlier. And if Railroad Company had contacted Mr. Doe's doctors as Mr. Zirklebach did, they would have discovered his doctors expressed the opinion that this could not have happened. Mr. Doe's doctors stated that the injuries Mr. Doe suffered could not have been caused by a sledgehammer or a baseball bat such as Ms. Bowen and Ms. Hamilton claimed which would result in broken bones and fractures; however, Mr. Doe suffered from torn muscles, nerve and ligament damage, and scar tissue.

Furthermore, Ms. Hamilton and Ms. Bowen claimed they could provide proof of Mr. Doe's alleged dishonesty by providing text message evidence; however, this is another claim by the girls that proved false. The girls were never able to furnish any text messages or other evidence to support their wild and ridiculous allegations. But Mr. Bybee did not care about that, and he was willing to testify to the girls' statements in the disciplinary hearing despite the outlandish claims that were unsupported by evidence based on Railroad Company's request. Even Mr. Bybee stated during his deposition while laughing, "I'll admit that this kind of accusation doesn't happen every day ... crazy accusations." Had Mr. Bybee been permitted to do his job and complete a full investigation, he would have discovered that Ms. Hamilton was homeless when Mr. Doe kindly let her into his home. After this, Ms. Hamilton repeatedly stole from Mr. Doe until he had no choice but to kick her out; this is the reason why Ms. Hamilton lied to RMCC. At trial, Mr. Bybee stated the girls' statements should not be relied on alone because "witnesses are kind of unreliable sometimes especially if they have a motive."

However, despite Mr. Bybee's finding, Railroad Company continued pressing forward and informed Mr. Doe there would be a disciplinary investigation. Railroad Company did not want to

ask the questions that should have been asked in a normal proceeding; they wanted an excuse to fire Mr. Doe for reporting an on-the-job injury that had happened less than a year earlier. Railroad Company had a goal in mind to terminate Mr. Doe regardless of what Mr. Bybee's criminal investigation showed, and the only reason they could not do so was because the two girls later recanted their statements.

Railroad Company continued and continues to push a distinction between a criminal and disciplinary investigation; however, the two are dependent upon each other. Railroad Company admitted to deciding to go forward with any charges for dishonesty based upon the two statements given to Mr. Bailey by Mr. Bybee, despite Mr. Bybee's conclusion that there was no corroborating evidence for the charges and no reason to charge Mr. Doe. Furthermore, Mr. Bailey did not even believe the allegations made by the two girls stating, "I didn't believe that anybody wanted to be hit with a sledgehammer in the elbow." Despite Mr. Bailey's discretion on whether or not to bring a charge, he pushed forward against Mr. Doe in retaliation even though he believed the accusations were incredible. The unanswered question and the elephant in the room is why? This is because Railroad Company wanted to pressure Mr. Doe to drop his FELA lawsuit.

Therefore, due to the close proximity in time between the protected activity and the unfavorable personnel action as well as the disparate treatment of the whistleblower employee, the deviation from normal procedures, and the discriminatory attitude shown by supervisors by forcing Mr. Bybee to limit his criminal investigation in order to deprive Mr. Doe a fair outcome, Mr. Doe can prove the injury was a contributing factor to the adverse action he suffered. Just imagine, had the witnesses continued their lies and testified, as incredible as the story was, as

unbelievable as it was, Mr. Doe would have been fired.

V.

CONCLUSION

Mr. Doe has established a prima facie case that Railroad Company retaliated against him in violation of the FRSA. It is admitted that Mr. Doe engaged in a protected activity when he filed a personal injury report for an on the job injury in August 2018. Railroad Company employees hosting the disciplinary investigation such as Mr. Bailey admitted they knew that Mr. Doe reported a personal injury. Further, the investigations and the personal injury were inextricably intertwined. Mr. Doe suffered an unfavorable personnel action due to the start of the disciplinary investigation by being suspended from work for months while the investigation was postponed for months at a time.

Railroad Company started a disciplinary investigation against Mr. Doe in part due to the protected activity he engaged in while working for the railroad which is exactly what the Federal Rail Safety Act, 49 U.S.C. § 20109 (FRSA) is designed to prevent against. Railroad Company disciplined an employee for reporting unsafe conditions and filing a FELA lawsuit. Therefore, the Judge should rule in Mr. Doe's favor and grant him the judgment deserved for the injuries he suffered at Railroad Company's expense. Mr. Doe engaged in a protected activity by reporting an on the job injury and that protected activity was a contributing factor to the adverse actions Mr. Doe suffered. Complainant requests Mr. Doe's real damages of \$100,000 based on the evidence presented at trial and punitive damages of \$250,000.

WHEREFORE, COMPLAINANT, John Doe, respectfully requests that this Judge rule in Mr. Doe's favor and award all damages compensatory and punitive to Mr. Doe for the injuries and mental anguish suffered at the hands of Railroad Company.

Applicant Details

First Name	Ronald
Last Name	Pantalena
Citizenship Status	U. S. Citizen
Email Address	Ron.Pantalena@gmail.com
Address	<div> Address Street 175 W Cheyenne Rd Apt 418 City Colorado Springs State/Territory Colorado Zip 80906 Country United States </div>
Contact Phone Number	5405324919

Applicant Education

BA/BS From	Regent University
Date of BA/BS	May 2017
JD/LLB From	University of Virginia School of Law http://www.law.virginia.edu
Date of JD/LLB	May 17, 2020
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Virginia Journal of Social Policy & the Law
Moot Court Experience	Yes
Moot Court Name(s)	Extramural Moot Court William Minor Lile Moot Court

Bar Admission

Admission(s)	New York
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Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Ballenger, Scott
sballenger@law.virginia.edu
(434) 924-7582
Moore, Richard
moore@charlottesville.gov
434-970-3760
This applicant has certified that all data entered in this profile and
any application documents are true and correct.

Ronald Pantalena
175 W Cheyenne Road, Apt 418
Colorado Springs, CO 80906
Rep8xf@virginia.edu | (540) 532-4919

August 31, 2020

The Honorable Elizabeth W. Hanes
U.S. District Court Eastern District of Virginia
U.S. Courthouse
701 East Broad Street, Suite 5318
Richmond, VA 23219

Dear Judge Hanes:

I am a recent graduate of the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers. Having been born and raised in Virginia, I would welcome the opportunity to work in Richmond.

I am enclosing my resume and transcripts. I have also enclosed as a writing sample a brief that I wrote for the William Minor Lile Moot Court Competition. You will be receiving letters of recommendation from Judge Moore (434-970-3774) and Professor Ballenger (434-924-3547).

If you have any questions or need to contact me for any reason, please feel free to reach me at the above address and telephone number. I appreciate your consideration.

Sincerely,

Ronald Pantalena

Ronald E. Pantalena, III

2401 Arlington Blvd., Apt 28 Charlottesville, VA 22903
(540) 532-4919 • Rep8xf@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, Virginia
J.D., May 2020

- *Virginia Journal of Social Policy & the Law*, Managing Editor
- Appellate Litigation Clinic
- William Minor Lile Moot Court Association, President
 - Quarterfinalist
- Extramural Moot Court, Director of Coaching and Training
 - Won first place in Southeastern Region in intellectual property competition
- Lambda Law Alliance

Regent University, Virginia Beach, Virginia
B.A., Government, May 2017

- Student Government, Executive Board Member
- Moot Court Executive Board, Treasurer and Competitor
- Study Abroad: Salamanca, Spain

EXPERIENCE

Cahill, Gordon & Reindel LLP, New York, New York
Summer Associate, Summer 2019

- Researched and wrote memoranda for attorneys to advise clients regarding white collar criminal defense and Foreign Corrupt Practices Act compliance
- Assisted attorneys in general commercial litigation matters

The Honorable Richard E. Moore, Charlottesville Circuit Court, Charlottesville, Virginia
Judicial Intern, May 2018 – May 2019; August 2019 – Present

- Reviewed pleadings to identify and analyze issues for resolution
- Researched statutory and common law provisions and prepared memoranda to advise Court on motions, judgements, and other matters
- Observed civil and criminal trials, pretrial hearings, and other court proceedings
- Notable cases on which I have conducted research for the Court:
 - *City of Charlottesville v. Pennsylvania Light Foot*: whether to enjoin parties from creating another rally in Charlottesville potentially similar to August, 2017. Issues included separation of powers, First and Second Amendment protections, standing, and statutory interpretation
 - *Payne v. City of Charlottesville*: whether the Jackson and Lee statues fall under Virginia's Monument Statute. Issues included legislative immunity, statutory interpretation, Equal Protection, and evidentiary issues

Professor Joseph Fore, Jr., University of Virginia School of Law Charlottesville, Virginia
Research Assistant, Summer 2018

- Conducted research on circuit splits to create problems, assignments, and materials for first-year Legal Research and Writing class
- Assisted in researching and drafting an article on estimative probability that won the 2020 Legal Writing Institute Emerging Scholar Award

INTERESTS

Hiking, traveling, baking, politics

Ronald Pantalena
University of Virginia School of Law

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Paul Mahoney	B+	4	
Torts	Jason Johnston	B+	4	
Civil Procedure	George Rutherglen	B+	4	
Criminal Law	Kimberly Ferzan	A-	3	
Legal Research and Writing	Joseph Fore	CR	1	Pass/fail

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Research and Writing	Joseph Fore	CR	1	Pass/fail
Constitutional Law	Deborah Hellman	A-	4	
Evidence	Darryl Brown	A	4	
Property	Alex Johnson	B+	4	
Insurance	Kenneth Abraham	A-	3	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Kevin Kordana	B+	4	
Professional Responsibility	George Cohen	B+	3	
Conflict of Laws	Frederick Shauer	B	3	
Advanced Civil Procedure	Benjamin Spencer	A-	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal Courts	Michael Collins	A-	4	
Trial Advocacy	Robert Wood	B+	3	
Legislation	Caleb Nelson	A-	4	
Secured Transactions	Steven Walt	B+	3	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Urban Law and Policy	Richard Schragger	A-	3	
Free Speech and Press	Frederick Schauer	A-	3	
Climate Change Law and Policy	Jonathan Cannon	B+	3	
Appellate Litigation Clinic	Scott Ballenger	CR	4	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Externship	Sprightley Ryan	CR	4	
Jurisprudence	Gregg Strauss	CR	3	
Antitrust	Joshua Fischman	CR	3	
Appellate Litigation Clinic	Scott Ballenger	CR	4	

J. Scott Ballenger
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

September 7, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I understand that Ronald Pantalena has applied for a clerkship in your chambers, and I am writing to recommend him to you enthusiastically. I have spent a lot of time with Ron this year in the Appellate Litigation Clinic I run here at the University of Virginia School of Law. He is both one of my strongest students and a real pleasure to know and to work with, and I am sure you would find him a real asset to your chambers.

My clinic is a full-year 8 credit course that gives 12 third-year law students a chance, working with my help and supervision, to take on actual cases in the federal courts of appeals. Ideally the students take full ownership of the case and handle it all the way from identification of the issues, through the briefing process, and ultimately oral argument. I took over the clinic last fall after 20 years as an associate and then a partner in the Supreme Court and Appellate practice at Latham & Watkins LLP in Washington, DC. (Before that I was a law clerk myself, to Judge Wallace on the Ninth Circuit and then Justice Scalia). I've also continued to teach two lecture classes, Class Actions and Civil Liberties, that I taught last year as an adjunct while still in private practice.

From the very beginning it was clear that Ron was starting with a big head start over most of the other students in the clinic. Because of his extensive moot court experience, both in law school and as an undergrad, Ron has just done a lot more persuasive legal writing than the average 3L, and it shows. He's also spent a lot of time thinking systematically about what makes for effective oral advocacy and how to teach it to others. He runs our premiere internal moot court competition here at UVa (Lile) and is the student director of coaching and training for our extramural moot court teams too. I suspect there are subjects I've tried to teach the clinic that Ron could have taught better, and I definitely find myself looking to him first for comments and suggestions as we go along.

Recognizing those advantages, I also gave Ron (and one of his classmates) our most challenging case—an appointment by the Third Circuit in a federal habeas appeal that is basically a Rosetta Stone for all of the difficult issues surrounding whether and when a federal prisoner can raise on collateral review a subsequent clarifying amendment to the Sentencing Guidelines. (No. 18-3776, in case it matters). There are four or five circuit splits about what kinds of Guidelines amendments are retroactive, when a Guidelines error is cognizable under § 2255, how the statute of limitations and second-or-successive bars operate in the context of a claim that could not be made until recently, and when a traditional habeas petition is available under § 2241 because the § 2255 remedy is "inadequate or ineffective." Ron has had to figure out this entire, cutting-edge landscape—and most recently yet another circuit split about a "collateral consequences" mootness issue, since our client was released and is now under supervision. He took the laboring oar on the briefing and has done just a fantastic job with it, taking a case that seemed hopeless and building up a set of arguments that I think very well may prevail. Win or lose, I think Ron's work has framed up a very complex and important set of issues in a way that basically cries out for a very important published decision and potentially even certiorari.

Ron writes and thinks clearly and well, digs hard into research, and isn't afraid of hard work. He tackles unexpected work on an inconvenient and short fuse with good cheer. The schedule for his Third Circuit appeal meant that the brief had to be written over the holidays while all his classmates were enjoying a relaxing break, but Ron handled it like the true professional he will soon be. He has a great attitude and has been a very positive force in the clinic. In particular he is very supportive of his classmates and has a great way of providing constructive feedback in the most positive and encouraging way. He has a deft touch with when he can be most helpful and when he should step back and let others find their own way. I am not a bit surprised that his peers keep selecting him for significant leadership roles around the Law School.

In comparing Ron's transcript to students from other schools, you should know that Virginia enforces a 3.3 mean at the level of each class. The practical consequence of that is that the overwhelmingly most common grade around here is a B+. As an instructor, for every A- you want to give you have to give a B. For every A, the math works out to a little more than two Bs. So grades better than B+ are very hard to come by, and an overall GPA substantially better than 3.3 puts a student high up in the class. UVa doesn't calculate class rank except for the top student or two, but when I was recruiting for my law firm they would tell us the break for the top 1/3. It was usually right around 3.4. Just eyeballing Ron's resume, it looks like a 3.5—which is surely in the top quarter of the class at least. And this is an extremely talented and competitive group of students, almost all of whom

Scott Ballenger - sballenger@law.virginia.edu - (434) 924-7582

are now arriving with resumes and LSAT scores that would have been exceptional back when I was a student here.

I hope you get a chance to meet Ron. I am confident you will like him, and that he will be a great law clerk for someone. And please feel free to contact me if you have any questions at all. I am at 202-701-4925 or sballenger@law.virginia.edu.

Sincerely,

J. Scott Ballenger

Scott Ballenger - sballenger@law.virginia.edu - (434) 924-7582

COMMONWEALTH OF VIRGINIA



Timothy K. Sanner
P.O. Box 799
Louisa, VA. 23093
(540)967-5300
(540)967-5681 (fax)

Cheryl V. Higgins
501 E. Jefferson St., 3rd Floor
Charlottesville, VA. 22902
(434)972-4015
(434)972-4071 (fax)

Richard E. Moore
315 E. High Street
Charlottesville, VA. 22902
(434)970-3760
(434)970-3038 (fax)

Sixteenth Judicial Court

Albemarle Culpeper Fluvanna Goochland
Greene Louisa Madison Orange Charlottesville

September 11, 2020

Dale B. Durrer
135 West Cameron Street
Culpeper, VA. 22701
(540)727-3440
(540)727-7535 (fax)

Claude V. Worrell
P.O. Box 386
Stanardsville, VA. 22973
(434)326-3723
(434)985-6723 (fax)

David B. Franzén
P.O. Box 230
Orange, VA. 22960
(540)672-2433
(540)672-2189 (fax)

To Any U.S. District Court or Circuit Court of Appeals Judge

Re: Recommendation of Ronald Edward Pantalena, III for judicial clerkship

Dear Judge:

I am writing to highly recommend Ron Pantalena as a judicial law clerk with you.

Mr. Pantalena was my law clerk in the Charlottesville Circuit Court for two successive years. He first clerked for me during the summer after his first year of law school at the University of Virginia (2018), and then he came back during both following school years, 2018-19 and 2019-20, in a part-time position. I was extremely pleased with his work and invited him back to clerk for me twice. He has worked on many research and writing projects for me and has sat with me on the bench to observe a variety of cases and proceedings, including jury trials.

In Virginia, the Circuit Court is the higher of two state trial court levels. It has sole jurisdiction to try felony cases, and is the only court in which jury trials take place. It is a general jurisdiction court, with both a civil and criminal docket. We hear all criminal cases, from appeals of misdemeanors to the most serious felonies. We also hear all types of civil cases, including personal injury and medical malpractice cases, contracts and business claims, estate disputes, and domestic relations matters. So Ron has had exposure to many types of cases, issues, and proceedings.

He did an excellent job for me. Ron is extremely sharp, perceptive, and attentive, and is a good communicator. He is hard-working, conscientious, prompt, and polite and courteous. He listens well, and comprehends problems and issues. He analyzes cases well, and has a keen understanding of case opinions and the distinctions between similar cases. He speaks his mind confidently and is willing to state a contrary view or interpretation that differs from my initial conclusions or inclination, but he does so respectfully. He has firm personal views on matters, but is able to give an objective opinion in spite of such. Ron works well with others, and fit in the office well. I was very confident in his work.

Judge of U.S. District Court or Court of Appeals

September 11, 2020

Page Two

I believe that Ron would work well with you as judge and with all court staff, as well as with attorneys and the public. I believe he would be an asset to the Court. I recommend and endorse him highly.

Please note that I am not speaking here officially for the Court, but rather these views are my own personal views, based on my personal and professional knowledge of Mr. Pantalena and my observation of him in a professional setting.

Please do not hesitate to let me know if you have any questions or if there is any way I can be of further assistance to you (or Mr. Pantalena) in considering his application and making your decision. I would be glad to speak with you at your convenience.

Sincerely,



Richard E. Moore, Judge
Charlottesville Circuit Court
(16th Judicial Circuit of Virginia)

rmoore@vacourts.gov

(434) 970-3774—office desk phone

QUESTION PRESENTED

- I. Should “exceeds authorized access” as used throughout the entire Computer Fraud and Abuse Act be expanded to include violating company policy regarding authorization, or should it be interpreted to mean persons who exceed their authorization by accessing information categorically off-limits?